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Supreme Court, U.S.
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No. 04-____

IN THE
Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
MARQUETTE WRESTLING CLUB,
YALE WRESTLING ASSOCIATION, AND
COLLEGE SPORTS COUNCIL,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION,

RESPONDENT.

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

QUESTIONS PRESENTED

Whether notice pleading applies to standing, and courts must provide notice to parties before going outside the pleadings and, where standing merges with the merits, should conduct a merits hearing.

Whether a court in a Rule 12(b)(1) proceeding can resolve conflicting allegations such as mixed-motive discrimination against a plaintiff without providing an opportunity for discovery.

Whether a party asserting an equal-protection injury under an indirect injury must – to establish redressability – prove their entitlement to the ultimate benefit, as distinct from equalizing the unequal treatment?

Whether a party asserting a procedural injury in the denial of favorable regulatory treatment or statutorily required procedures must – to establish redressability – prove their entitlement to the ultimate goal of the process at issue, or merely compliance with the procedural requirement.

Whether 20 U.S.C. § 1683 waives sovereign immunity for judicial review of rules, regulations, and orders issued under 20 U.S.C. § 1682 or, alternatively, makes such actions *reviewable by statute*, and thus outside the adequate-remedy bar of 5 U.S.C. § 704 of the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA")?

Whether an implied private right of action to enforce statutory violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX") against third parties constitutes the "special and adequate review procedures" necessary to displace judicial review of agency action under both the APA and non-APA nonstatutory review, and (if so) whether that private right displaces such review for parties that – due to a lack of capacity or standing – cannot assert a timely action under such private right?

Whether the 1976 amendments to 5 U.S.C. §§ 702 and 703 impliedly extended 5 U.S.C. § 704's "adequate-remedy bar" and the common-law doctrine of sovereign immunity

to actions against federal officers acting *ultra vires?*

Whether federal-question jurisdiction, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, support judicial review of *ultra vires* actions in a suit against a federal agency and its officers?

PARTIES TO THE PROCEEDING

Petitioners National Wrestling Coaches Association ("NWCA"), Committee to Save Bucknell Wrestling ("CSBW"), Marquette Wrestling Club ("MWC"), Yale Wrestling Association ("YWA"), and College Sports Council ("CSC") were plaintiffs in the district court and appellants in the court of appeals. Respondent U.S. Department of Education ("USDE") was the defendant in the district court and the appellee in the court of appeals.

A proffered (but rejected) Second Amended Complaint would have added the "Secretary of Education" and the "Assistant Secretary for Civil Rights" as official-capacity defendants, without stating or alleging their given names. At the time, the Hon. Roderick Paige was Secretary and the Hon. Gerald Reynolds was Assistant Secretary. Dr. Paige remains Secretary, but Mr. Reynolds subsequently became Chairman of the U.S. Commission on Civil Rights. The Hon. James Manning now serves as the Assistant Secretary in an acting or delegated capacity. As part of a pending FED. R. CIV. P. 60(b) motion, petitioners seek leave to include the named officers as official-capacity defendants, and a separate (*i.e.*, new) suit already has so named and served them.

Pursuant to this Court's Rule 29.6, petitioners state that NWCA and CSC are non-profit corporations, CSBW, MWC, and YWA are nonprofit associations, and no publicly held company owns an interest of 10% or more in any petitioner.

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PETITION FOR WRIT OF *CERTIORARI*

Petitioners respectfully ask this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decisions of the court of appeals are reported at 366 F.3d 930 (D.C. Cir. 2004) and 383 F.3d 1047 (D.C. Cir. 2004), reprinted in the Appendix ("App.") at 90a and 143a, respectively. The decision of the district court is reported at 263 F.Supp.2d 82 (D.D.C. 2003); that decision and the court's order are reprinted at 1a and 89a, respectively.

JURISDICTION

The court of appeals' decision was filed on May 14, 2004, and a timely petition for rehearing and rehearing *en banc* was denied on October 8, 2004. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(4), 1361, and D.C. Code § 11-501. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

The Appendix sets out relevant excerpts from 20 U.S.C. §§ 1681-1683, 5 U.S.C. 551, 553, 702, 704, 45 C.F.R. §86.41, agency orders from 1979, 1996, and 2003.

STATEMENT OF THE CASE

This petition presents numerous inter-related and important questions on the justiciability of injuries occasioned by federal agencies operating in violation of the Constitution, their governing statutes, and their own regulations: (1) under notice pleading, a court must accept a plain allegation of standing and cannot without notice to the parties go outside the pleadings, and should proceed to a merits hearing where standing merges with the merits. *See* Section I.A (Specificity of Pleadings), *infra;* (2) plaintiffs asserting equal-protection or procedural injury need not establish their entitlement to the ultimate benefit to challenge government action that is a substantial (albeit indirect) factor in the injury or that governs how third parties interact with the plaintiffs.

See Sections I.C (Determination of Status), I.D (Equal Protection), and I.E (Procedural Injuries), *infra;* (3) by expressly incorporating judicial review, § 903 makes agency rules, regulations, and orders reviewable by statute, outside § 704's adequate remedy bar. *See* Section II.A.1 (Title IX Provides Statutory Review), *infra;* (4) the 1976 APA amendments did not inadvertently apply sovereign-immunity protections to federal officers' unlawful acts. *See* Section II.A.2 (§ 704 Does Not Immunize Officers), *infra;* and (5) in the absence of a statutory prohibition against review, § 704 does not displace judicial review of legislative rules or procedural APA rulemaking violations. *See* Section II.B (Alternate Remedy Is "Inadequate"), *infra.* Because the decision here conflicts with the circuits and this Court on these, this Court should grant the writ of *certiorari.*

Statutory Background

Modeled on § 601 of the Civil Rights Act of 1964, Title IX prohibits gender-based discrimination in certain federally funded education programs. 20 U.S.C. § 1681(a). Like Title VI, Title IX prohibits intentional discrimination (*i.e., because* of gender, not merely *in spite of* gender), *Alexander v. Sandoval,* 532 U.S. 275, 282-83 & n.2 (2001), *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979), and seeks to eliminate all "quotas," "ceilings," "even splits," "arbitrary ratios," and "specific percentage balances" (collectively, hereinafter "quotas"). *See* 117 Cong. Rec. 30,409, 39,251 39,259, 39,262 (1971); 118 Cong. Rec. 5812-13 (1972).

In its one departure from Title VI, Congress included Title VII's restriction against preferential treatment based on imbalances with the total population, 20 U.S.C. 1681(b), which is "designed to prevent . . . undue 'Federal Government interference . . . because of some Federal employee's ideas of . . . balance.'" *United Steelworkers of Am. v. Weber,* 443 U.S. 193, 206-07 (1979) (citations omitted). Although § 901(b) allows courts and agencies to consider "statistical evidence" in a specific "hearing or proceeding," 20 U.S.C. 1681(b), it

"would be contrary to Congress' clearly expressed intent" to allow "quotas and preferential treatment [to] become the only cost-effective means of avoiding expensive litigation." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (plurality); *accord Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652-53 (1989).

Like Title VI, Title IX authorized funding agencies to issues rules to effectuate the statutory prohibition against intentional discrimination, 20 U.S.C. 1682, authority the Senate sponsor said "to permit differential treatment by sex" only in "*very unusual* cases" where "such treatment is *absolutely necessary*," such as the need for privacy in locker rooms and classes for pregnant women. 118 Cong. Rec. 5807 (1972) (emphasis added). With the exception of that statement, § 902 is identical to § 602. *Compare* 20 U.S.C. § 1682 *with* 42 U.S.C. § 2000d-1. With no legislative history for Title IX, the § 602's legislative history provides the only basis to understand § 902.[1] That history make clear that agencies must effectuate the statute via rules, regulations, and orders of general applicability, 42 U.S.C. § 2000d-1, which do not become effective unless and until signed by the President in the *Federal Register*.[2] 42 U.S.C. § 2000d-1; 110 Cong. Rec. 2499-00

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[1] *See, e.g.*, 118 Cong. Rec. 5803 (Title IX would have the same procedural protections afforded under Title VI) (Sen. Bayh). id. at 5808 ("These provisions [including what became Section 902] parallel Title VI of the 1964 Civil Rights Act") (fact sheet submitted by Sen. Bayh); 1975 Hearings, at 170 ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (prepared statement of Sen. Bayh).

[2] In 1980, the President delegated the rule-approval and enforcement authority to the Attorney General. 45 Fed. Reg. 72,995 (1980) (Executive Order 12,250). In 1981, the Attorney General delegated enforcement authority (but not the rule-approval authority) to the Assistant Attorney General for the Department of Justice's Civil Rights Division. 46 Fed. Reg. 29,704

(Footnote cont'd on next page)

(1964) (Rep. Lindsay); *North Haven*, 456 U.S. at 522 n.12.[3] Finally, Title IX adopts Title VI's judicial review provision, *compare* 20 U.S.C. § 1683 *with* 42 U.S.C. § 2000d-2, which makes rules, regulations, and orders subject to the same judicial review available for similar actions by the agency.

Regulatory Background

Unlike the statute, the 1975 regulations: require equal opportunity, based on interest and ability, 45 C.F.R. § 86.41(c)(i); "require institutions to take the interests of both sexes into account in determining what sports to offer," 40 Fed. Reg. 24,128, 24,134 (1975); and authorize schools to do so "in any reasonable way the school considers appropriate, *id.*" As the Secretary of HEW testified to Congress, "the interest and abilities of both sexes . . . obviously involves learning about those interests in one way or another." *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., at 440 (1975). (hereinafter "*1975 Hearing*")

(Footnote cont'd from previous page.)

(1981). Because no President or Attorney General has approved USDE's Title IX regulations, the Department of Health, Education, and Welfare's original Title IX regulations remain in effect for purposes of USDE's Title IX enforcement. 20 U.S.C. § 3505(a).

[3] Title VI's proponents repeatedly cited presidential approval as a bulwark against bureaucratic overreaching. *See, e.g.*, 110 Cong. Rec. 6562 (Sen. Kuchel); 110 Cong. Rec. 7059 (Sen. Pastore).; 110 Cong. Rec. 5256 (Sen. Humphrey); 110 Cong. Rec. 6544 (Sen. Humphrey); 110 Cong. Rec. 6562 (Sen. Kuchel); 110 Cong. Rec. 6749 (Sen. Moss); 110 Cong. Rec. 6988 (explanatory memorandum by Rep. McCulloch, inserted by Sen. Scott); 110 Cong. Rec. 7058 (Sen. Pastore); 110 Cong. Rec. 7066 (Sen. Kuchel); 110 Cong. Rec. 7067 (Sen. Kuchel); 110 Cong. Rec. 7103 (Sen. Javits); 110 Cong. Rec. 11,941 (letter from Attorney General Kennedy, inserted by Sen. Cooper); 110 Cong. Rec. 12,716 (Sen. Humphrey); 110 Cong. Rec. 13,334 (Sen. Pastore); 110 Cong. Rec. 13,377 (Sen. Allott).

Contrary to the 1975 regulations, the 1979 Three-Part Test narrows schools' latitude to three options: (1) a quota based on enrollment ratios, (2) progress on the way to prong one, and (3) fully accommodating the underrepresented gender's interest. 44 Fed. Reg. 71,418. In doing so, however, HEW expressly (if obliquely) states that the document does not apply prospectively, 44 Fed. Reg. 71,414 (disavowing "a separate section on institutions' future responsibilities"), and instead refers future compliance to the interest-and-abilities section of the regulation, *id.* Archival documents from HEW make clear that USDE's predecessor very carefully and publicly contorted its document to avoid procedural requirements. App. 205a (General Counsel warns in March that "[i]f we go too far in the other direction and claim that this policy statement is a "rule" of general applicability it would have to be approved by the President"); 207a (General Counsel "conclude[s in April] that the interpretation, when final" must comply with the General Education Provision ("GEPA") requirement of submittal to Congress); 214a-221a (staff lawyer concludes in October that submittal is unnecessary, provided that HEW revises the document to avoid imposing new requirements).[4] In addition, record evidence shows that in 1980 USDE interpreted prong three ("full accommodation") to mean meeting the gender's relative interest to the same relative extent.

In its press release announcing its 1996 clarification, USDE characterizes the Three-Part Test as "legal obligations." App. 234a. Unlike the 1979 version, the 1996 version purports to be a prospective legal requirement. App. 178a

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[4] Concerned primarily with ensuring that the document did not constitute an "interpretation" under GEPA, App. 216a, HEW unfortunately neglected to consider the breadth of "order," which the Court announced a year later. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238, n. 7 (1980).

("The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test"). Further, unlike the 1979 version, the 1996 version's third prong requires full accommodation only of the underrepresented gender, changing the 1979 version's focus on relative accommodation.

Unlike the 1996 version, the 2003 version makes the second and third prongs safe harbors. In sum, the regulatory standard changed from (a) equal opportunity based on interest with a requirement to assess the interest of both genders in 1975 to equal participation based on enrollment with no need to assess the interest of the "over-represented" gender (*i.e.*, men) in 1996; (b) non-prospective document for complaints pending in 1979 to prospective "legal obligation" in 1996; (c) subject to a regulatory and statutory prohibition against discrimination in 1979 to a safe harbor that authorizes gender-conscious cutting and capping solely to meet a quota determined by enrollment ratios in 1996 and 2003.[5]

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[5] Petitioners allege that all of these changes require notice-and-comment rulemaking. *See, e.g., McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1322 (D.C. Cir. 1988) (a rule that "substantially curtails . . . discretion . . . has present binding effect" is legislative); *Indep. U. S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 918 (D.C. Cir. 1982) (agency "not required by law to promulgate any rules limiting its discretion [but] was nonetheless bound by [APA]"); *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 382-83 (D.C. Cir. 2002); (agency pronouncement is "binding" if it appears binding on its face, the agency applies it in a binding manner, it creates a norm or safe harbor, or the regulated community holds a reasonable belief that it is binding); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (notice-and-comment requirement applies to otherwise interpretive rules that change a prior regulation or interpretive rule); *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (same); *Nat'l Tour Brokers Ass'n v. U. S.*, 591 F.2d 896, 899 & nn.8-10 (D.C. Cir. 1978) (when a self-described interpretive rule or policy statement legally required notice-and-comment rulemaking, the fact that the agency provided notice and took comment does not satisfy the APA); *McLouth*

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District Court Proceedings

Filed in January 2002, the complaint had seven counts: (1) USDE has not authority to adopt disparate-impact standards for Title IX, (2) if USDE may adopt such standards, it must use interest (not enrollment) as its measure; (3) USDE's 1996 action unlawfully denied NWCA's petition (App. 225a-232a) to amend or repeal the Three-Part Test, (4) through the 1996 clarification and its enforcement program, USDE "consciously and expressly adopted a general policy" that abdicates its Title IX duties; (5) the Three-Part Test is not in effect for failure to meet § 902's presidential-approval process; (6) the 1979 Three-Part Test violated the APA rulemaking requirements; and (7) the 1996 clarification violated those requirements. In May 2002, petitioners filed their amended complaint, App. 236a-267a, primarily to substitute the newly incorporated CSC for an unincorporated association. USDE moved to dismiss pursuant to FED. R. CIV. P. 12(b)(1), and petitioners cross-moved for summary judgment, which the district court stayed on USDE's motion. After oral argument, petitioners moved for leave to file a Second Amended Complaint (1) to allege NWCA had school members in 35 states (which included Northwestern and Muhlenberg); (2) to add USDE officers as official-capacity defendants; (3) to add non-APA nonstatutory review; and (4) to conform to evidence presented during briefing. In June 2003, the district court granted the motion to dismiss and denied leave to file an amended complaint. App. 1a. In June 2004, petitioners filed a now-pending Rule 60(b) motion based *inter alia* on new evidence and changed circumstances.

(Footnote cont'd from previous page.)

Steel Prod. Corp., 838 F.2d at 1323 (same); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (course changes require a reasoned analysis beyond that required in the first instance).

Court of Appeals Proceedings

In affirming the district court's dismissal under FED. R. CIV. P. 12(b)(1), the court of appeals relied on two related grounds: standing to challenge government regulation of indirect injuries and the "adequate-remedy bar" of 5 U.S.C. § 704. App. 90a. Senior Judge Williams dissented. App. 123a. Upon the denial of a timely petition for reconsideration, Judge Williams again dissented, App. 148a, which the panel majority answered by *per curium* decision, App. 143a. A vote was requested, after which a majority of judges in active service did not vote for rehearing. Chief Judge Ginsburg indicated that he would grant the petition for the reasons stated in Judge Williams' dissent. App. 144a.

FED. R. CIV. P. 11(b)(3) and 28 USC § 1653

In seeking appellate reconsideration, petitioners' counsel advised the court that - in the parallel proceedings in the district court - he has and will assert that the Three-Part Test causes appellants' injury and repeal will redress most if not all members' injuries, citing FED. R. CIV. P. 11(b)(3) (counsel statements made after reasonable inquiry which likely could be proved by discovery). Although the court did not take accept that proffer, 28 U.S.C. § 1653 apparently authorizes it to have done so, *Nat'l Post Office Mail Handlers Local No. 305 v. U.S. Postal Serv.*, 594 F.2d 988, 991 (4th Cir. 1979); *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 & n.6 (11th Cir. 1993), *cert. denied* 510 U.S. 1040 (1994); *Gillis v. U.S. Dep't of Health & Human Servs.*, 759 F.2d 565, 571 n. 9 (6th Cir.1985), as it does this Court. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830-32 (1989); *Schlesinger v. Councilman*, 420 U.S. 738, 745 (1975).

The panel majority declined to specify the "particulars" of its holding that 5 U.S.C. § 704 applies sovereign immunity to an action for injunctive relief against *ultra vires* actions by agency officers. App. 117a. Insofar as the majority may simply have meant that naming an officer by title (*e.g.*, Secretary

of Education), without given name (*e.g.*, Dr. Roderick Paige) rendered the action one against an *office* of the United States rather than an *officer*. Had petitioners been granted leave to file their Second Amended Complaint, however, they could have named the officers on appeal. 28 U.S.C. § 1653; *Kennedy v. Rabinowitz*, 318 F.2d 181, 182 & n.6 (D.C. Cir. 1963) (allowing plaintiff-appellant to name Robert F. Kennedy on appeal, notwithstanding that complaint named only the "Attorney General of the United States" as the defendant).

REASONS TO GRANT THE WRIT

1. Establishing notice pleading for the standing inquiry and requiring notice to the parties before a court goes outside the pleadings would streamline litigation, as several circuits have recognized.

2. The panel majority's contention that a policy causes no injury is contrary to this Court's caselaw under § 704, which recognizes the ability to challenge the guidelines under which federal programs operate. This is particularly compelling where plaintiffs contend that the "policy" amended (without rulemaking) a regulatory standard approved by the President and laid before Congress under the unique procedural provisions of civil rights legislation. With many legislative programs having judicial review limited to the D.C. Circuit, *e.g.*, 15 U.S.C. § 766(c); 42 U.S.C. §§ 4915(a), 6976(a), 7607(b), it is particularly important for this Court to review this issue to resolve the apparent unanimity of other circuits finding judicial review, n.15, *infra*, versus the panel majority's body of D.C. Circuit caselaw withholding it.

3. The panel majority's suggestion that APA amendments designed to *eliminate* sovereign immunity for injunctive relief somehow immunizes agency officer acting *ultra vires*, placing agencies in a preferred position to the Executive, Legislative, and Judicial branches, is unthinkable and conflicts with every circuit and blackletter law.

I. PETITIONERS HAVE STANDING

Standing involves a tripartite test of injury, causation, and redressability, and while directly inflicted injuries pose "little question" of causation or redressability, the plaintiff has a heightened showing when government action affects third parties, who then cause injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Although analyzed as an indirect-injury case, this action also represents *direct* injury, which would obviate the heightened showing.[6]

A. Specificity of Pleadings

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Defenders of Wildlife*, 504 U.S. at 561. Although the courts below found petitioners' complaint conclusory, that is all that notice pleading requires. *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683-85 (1973); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) (finding standing based on conclusory allega-

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[6] Because it *directly* alters the terms on which petitioners interact with schools, the Three-Part Test *directly* injures petitioners. Henry P. Monaghan, Third Party Standing, 84 COLUM. L. REV. 277, 299 (1984) ("a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction"); *FAIC Securities, Inc. v. U.S.*, 768 F.2d 352, 360 n.5 (D.C. Cir. 1985) (*citing* Monaghan) (Scalia, J.); *Law Offices of Seymour M. Chase, P.C. v. F.C.C.*, 843 F.2d 517, 524 (D.C. Cir. 1988) (R. Ginsburg, J.); *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 422-23 (1942) (broadcasters had standing to challenge regulations applicable to station owners, which altered the terms on which station owners could interact with broadcasters) ("*CBS*").

tions); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).[7]

A federal court has the threshold jurisdiction to hear a claim if the plaintiff can prevail if federal law is given one construction, notwithstanding that another construction would lead to the opposite result. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998).[8] Where standing merges with the merits (*e.g.*, because an agency rule authorizes otherwise-illegal conduct or violated procedural rights), courts should proceed to a merits hearing, *Land v. Dollar*, 330 U.S. 731, 739 (1947); *Gulf Oil Corp. v. Copp Paving Co. Inc.*, 419 U.S. 186, 203 n.19 (1974), which the district court specifically avoided by staying the briefing of petitioners' Motion for Summary Judgment. App. 4a. Instead, the district court *sua sponte* without notice went outside the pleadings, App. 32a, which required notice to the parties and a schedule for the submittal of affidavits and documents, *Gordon v. Nat'l Youth*

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[7] *See also Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004) ("knew or should have known" allegation sufficient to impute knowledge at pleading stage); *Hamad v. Woodcrest Condominium Ass'n*, 328 F.3d 224, 232-33 (6th Cir. 2003) (applying *Swierkiewicz* to standing inquiry); *Thomson v. Washington*, 362 F.3d 969, 970-71 (7th Cir. 2004) ("Federal judges are forbidden to supplement the federal rules by requiring "heightened" pleading of claims not listed in Rule 9"). Significantly, the majority's cases on insufficiency of proof are *summary-judgment* cases. App. 107a-111a; *cf. Crete Carrier Corp. v. EPA*, 363 F.3d 490 (D.C. Cir. 2004) (involves direct appellate review of agency action, 42 U.S.C. § 7607(b), which compresses the Rule 12(b) and Rule 56 standards into a single briefing schedule).

[8] As a corollary, courts should not selectively and inconsistently accept allegations, just to defeat jurisdiction. *Compare* App. 106a ("Appellants make no such claim" that "gender conscious elimination of men's sports teams would be illegal in the absence of the challenged enforcement policies") *with id.* 115a (appellants have action against school for *intentional discrimination*, which displaces APA review) *and* 146a ("It is clear beyond dispute that appellants' asserted injuries arise solely from the universities' actions allegedly taken in derogation of Title IX"). As Judge Williams recognized, petitioners allege the authorization of illegal conduct. App. 151a.

Work Alliance, 675 F.2d 356, 341-42 (D.C. Cir. 1981).

B. Otherwise-Illegal Conduct

Indirect injury presents no obstacle where government action authorizes otherwise-illegal conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (government authorization sufficient to confer standing); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976) (privately inflicted injury is traceable to government action if the injurious conduct "would have been illegal without that action"). The Due Process Clause includes an equal-protection component applicable to the federal government, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), which follows the same equal-protection analysis as the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). Under this analysis, numerical "balance is not to be achieved for its own sake," and there is "no duty to remedy imbalance . . . caused by demographic factors." *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).[9] Only prior intentional discrimination authorizes a gender-conscious remedy that entails reverse discrimination. 45 C.F.R. §§ 86.3, .41(a); *U.S. v. Fordice*, 505 U.S. 717, 732 n.7 (1992); *cf.* 40 Fed. Reg. at 24,134 (in its athletics regulation, HEW dropped a proposed "requirement [that] could be considered 'affirmative action' and somewhat inconsistent with § 86.3").

In *Truax v. Raich*, 239 U.S. 33, 36-38 (1915), an alien employee had standing to challenge a law under which his em-

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[9] *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989) (look to qualified applicants, not general population, to assess equal opportunity); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 651 (1989) ("nonsensical" to measure alleged discrimination by comparing participation in specialized pursuits with general population); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997 (1988) ("statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value").

ployer would dismiss him *solely* to meet the law's quota on the percentage of aliens in *employers'* workforces. Just as Mr. Raich could sue the government directly for the unconstitutional quota that the government imposed *on his employer,* petitioners have standing to challenge government policies and practices that authorize and direct recipients to cut and cap their teams *solely* to meet proportionality and without considering relative interest, in violation of Title IX, 20 U.S.C. § 1681(a), the implementing regulations, 45 C.F.R. § 86.41(a), (c)(1), and (for public schools) the Equal Protection Clause, U.S. CONST. amend. XIV, § 1.

In adopting this quota and authorizing discrimination to meet it, the Three-Part Test and the 1996 and 2003 clarifications "restrict, abrogate, or dilute" equal-protection rights and are *ultra vires* Title IX. *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 732 (1982); 20 U.S.C. § 1682 (authorizing only actions to effectuate § 901(a)'s ban of intentional discrimination); *U.S. v. Am. Library Ass'n,* 539 U.S. 194, 203 (2003) (Congress may not use spending power to induce recipients "to engage in activities that would themselves be unconstitutional"); *South Dakota v. Dole,* 483 U.S. 203, 210-11 (1987) (Congress cannot condition funding on invidiously discriminatory action). What Congress cannot do by statute, agency staff cannot do by fiat.

C. Determination of Status

Those erroneously stigmatized by an agency acting *ultra vires* have standing where the stigma leads to an array of adverse private and governmental actions. *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 140-41 (1951). "While . . . it does not suffice if the injury complained of is th[e] result [of] the *independent* action of some third party not before the court, that does not exclude injury produced by determinative or coercive effect upon the action of someone else." *Bennett v Spear,* 520 U.S. 154, 169 (1997) (citations and quotations omitted, emphasis in original).

Without analyzing relative interest as required by the

regulations, statute, and Constitution, the Three-Part Test labels male athletes as overrepresented. Like the *McGrath* label in 1951, the Three-Part Test's determination of status causes petitioners injury today. Because the each of the three prongs forecloses cutting a women's team at a non-proportional school, *see Cohen v. Brown Univ.*, 991 F.2d 888, 899 & n.16 (1st Cir. 1993), all budget-driven cuts fall on men. Although the panel majority states that a mere policy can cause no injury, App. 146a-147a, petitioners deserved an opportunity to prove their "substantial factor" allegation. *E.g., Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986); *Tozzi v. HHS*, 271 F.3d 301, 307-10 (D.C. Cir. 2002); App. 150a-151a (dissent's discussion of "substantial factor" test); *Brock*, 477 U.S. at 284 (standing to seek change in federal guidelines that govern determination of benefits that plaintiff's members "believe they are due").

Petitioners argued that both existing and cut teams' "odds [would be] *significantly* better" without the Three-Part Test, Tr. 13 (emphasis added), which the panel majority truncates to "better odds," App. 103a, without discussing *Utah v. Evans*, which petitioners cited for the proposition that a "*significant increase in the likelihood* that the plaintiff would obtain relief" from third parties satisfied redressability for an indirect injury, 536 U.S. 452, 464 (2002) (collecting cases). Similarly, in holding that petitioners did not "demonstrate that causation is so clear that redressability inexorably follows," but accepting General Accounting Office ("GAO") data suggesting a 36-team aggregate *gain* in men's teams, the panel majority erred: the Second Amended Complaint alleges that the GAO data "represent a loss of more than 800 men's teams" (¶ 64 & n.2), and petitioners deserve consideration of *their* injuries under *their* allegations. *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) (past injuries evidence imminence of future injury).

D. Equal Protection

Record evidence showed that (under the Three-Part

Test) women are more than ten times more likely to gain a team because of gender equity, and men are more than five times more likely to lose one for that reason, that male athletes outnumber female athletes by 58.5% to 41.5% in high school and 58.7% to 41.2% in college, and that female students outnumber male students by 54.8 to 45.2 in college. Given that men have higher apparent interest and women have higher enrollment, the choice of fulcrum – *i.e.*, interest or enrollment – is outcome determinative in defining equal protection. Under petitioners' theory, schools' application of the Three-Part Test to cut or cap teams and to refuse to reinstate teams (even privately funded teams) constitutes an "invasion of a legally protected interest . . . in a manner that is 'particularized'" to petitioners' members, which is an injury *per se*, whether or not the plaintiff would secure the benefit with the injury removed. *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 211 (1995); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) ("'*injury in fact*' . . . is the denial of equal treatment [from] imposition of the barrier, not the ultimate inability to obtain the benefit") (emphasis added); *Orr v. Orr*, 440 U.S. 268, 273 (1979) ("There is no question but that Mr. Orr bears a burden he would not bear were he female[: that] burden alone is sufficient to establish standing").

As Judge Williams noted, the Three-Part Test gives schools a significant financial impetus to achieve proportionality. App. 126a, 150a. Indeed, courts have found (and petitioners cited) "formidable evidence" that schools will change their policies as necessary to ensure their continued eligibility for federal funds. *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 417 (D.C. Cir. 1994). Given such dependence on federal funds, it beggars the imagination that a school would forego federal funds to continue to use the Three-Part Test, solely to deny varsity status to self-funded teams like Yale or Marquette (*i.e.*, teams already allowed on campus). Recent decisions on the Solomon Amendment demonstrate that schools (specifically including Yale) will abandon antidis-

crimination policies to avoid losing federal funds. *E.g., Student Members of SAME v. Rumsfeld,* 321 F.Supp.2d 388, 391 (D. Conn. June 9, 2004) (Yale Law School reverses policy to avoid Yale's loss of over $300 million annually). Whatever high-minded principles they may cite when cutting or capping men's teams, schools blow with the wind of federal funding, and right now the prevailing wind comes from the Three-Part Test. If the wind changes, the schools will follow.[10]

Although *Defenders of Wildlife* requires a *heightened redressability showing* for indirect injuries, the panel majority takes the unprecedented extra step of requiring redress of a *different injury* (*i.e.,* the cut team, not the unequal footing). Although the panel majority justified its departure by citing the indirect nature of petitioners' unequal-footing claim, this Court recently foreclosed that end run. *Clinton v. City of New*

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[10] The panel majority notes that exhibits filed with the Second Amended Complaint cite reasons in addition to the Three-Part Test for the Bucknell and Marquette cuts. App. 104a. With mixed-motive discrimination, a plaintiff is entitled to discovery to determine whether proffered bases are pretextual (here, simply "happytalk" in a press release). *Price Waterhouse v. Hopkins,* 490 U.S. 228, 247 n.12 (1989) (plurality) (superseded by statute on other grounds); *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 99-100 (2003) (no heightened burden *to prevail* in mixed-motive discrimination). Similarly, although the complaint accuses USDE of violating the Equal Protection Component of the Fifth Amendment – which only the federal government can violate – the panel majority finds that petitioners' "asserted injuries arise solely from the universities' actions allegedly taken in derogation of Title IX." App. 146a. In fact, petitioners accuse USDE of affirmatively encouraging cutting and capping. *See* App. 227a ("coach was forced to cut his non-scholarship/walk-on athletes to meet the OCR's proportionality quota [and students are] dropped for no other reason than to satisfy your quota") (emphasis in original), 232a ("Remember in your zeal to vindicate the rights of females, there are also many males out there whose interests and rights you are supposed to be representing too"). Too petitioners, USDE's overzealous and unlawful action causes the problem.

York, 524 U.S. 417, 433 & n.22 (1998) (majority applies the doctrine to third-party cases generally); 524 U.S. at 456-57 (dissenter would limit the doctrine to equal-protection cases, such as this one) (Scalia, J., dissenting).[11]

E. **Procedural Injuries**

The Constitution, Title IX, and the APA all confer procedural rights, *e.g.*, Administrative Procedure Act: Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess., at 278 (1946) ("procedural rights conferred by this bill") ("APA Leg. Hist."), the denial of which cause injury redressable by a court. *Warth v. Seldin*, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right . . . the alleged deprivation of which can confer standing").

As set forth *supra*, the evolution of regulatory standards (*e.g.*, changing the 1975 regulations without rulemaking, removing the 1975 requirement to consider men's interests, classifying men as over-represented without evidence or rulemaking) violates the APA. By foregoing the required rulemaking, USDE inflicted a procedural injury, for which "those adversely affected . . . generally have standing to complain." *FEC v. Akins*, 524 U.S. 11, 25 (1998) (citing cases). Rescission and a new agency action on remand may produce the same result, *id.*, but until that happens, the initial injury remains "fairly traceable" to the agency's procedurally de-

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[11] The panel majority cites inapposite tax and zoning cases. App. 101a-102a. Plaintiffs there could not assert unequal-footing injuries, and so bore the irony of the criticism that equality before the law forbids both rich and poor from sleeping under bridges. The plaintiffs lacked a right to free medical care, had no equal-protection interest in eliminating tax exemptions for exclusionary schools that they did not want to attend, and could not afford to live in Penfield. By contrast, petitioners here assert constitutional, statutory, and regulatory equal-protection rights, wish to participate in the regulated activity, but – *because of their gender* – their schools rejected even their offers to *pay the full cost of their benefit*.

fective initial action, and redressable by an order striking the initial agency action, *id.*

For *procedural* injuries, moreover, petitioners need not show that, but for the procedural lapse, the plaintiff would have received a different substantive result. *Defenders of Wildlife,* 504 U.S. at 573 n.7. Instead, plaintiffs "accorded a procedural right to protect [their] concrete interests" need show only a sufficiently concrete relationship between the procedural step and the substantive result, and the redressability and immediacy requirements apply to the *present procedural violation,* which may injure the concrete interest, rather than to the concrete (but less certain) future injury. *Id.* Given their undisputedly concrete injuries from gender-based cutting and capping, petitioners do not have merely an abstract interest in USDE's following APA procedures for Title IX's procedural and substantive rules.

As the Court noted, "'procedural rights' are special," *id.,* and their denial constitutes a distinct injury. *Compare Texas v. Lesage,* 528 U.S. 18, 21 (1999) (no redressability for substantive due process violation if defendant has nondiscriminatory basis to inflict same injury) *with Carey v. Piphus,* 435 U.S. 247, 266-67 (1978) ("right to procedural due process is 'absolute' [and] does not depend upon the merits of a claimant's substantive assertions"). Procedural violations warrant nominal damages, even when the ultimate substantive injury would have resulted under the correct procedures. *Carey,* 435 U.S. at 266-67. Thus, the public has standing to challenge an agency's dispensing with procedures that control third parties' ability to affect the public. *See, e.g., Sierra Club v. EPA,* 129 F.3d 137, 139 (D.C. Cir. 1997) ("no doubt" that affected public has standing to challenge removal of regulation that requires states to consider public exposure to statutory harm) (Edwards, J.); *Morton v. Ruiz,* 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures").

In addition to APA violations and the denial of the Title

IX regulation's procedural protections, petitioners also assert the denial of § 902' relatively unique presidential-approval procedure, which protects against bureaucratic overreaching. As the legislative history makes clear, that protection was vital in securing the enactment of civil rights legislation. *See* nn.1, 3, and accompanying text, *supra.*

II. SECTION 704 DOES NOT BAR REVIEW

In holding that § 704's adequate-remedy bar provides an alternate basis for dismissal, App. 115a-119a, the panel majority erred in three distinct ways: (1) the adequate-remedy bar does not apply to review of Title IX rules, regulations, and orders; (2) sovereign immunity (like § 704) does not apply to suits to enjoin federal officers' *ultra vires* actions, and (3) petitioners' alternate remedies are inadequate. Each warrants review by this Court.

A. Adequate-Remedy Bar Is Inapposite

1. Title IX Provides Statutory Review

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Thus, by its terms, the adequate-remedy bar does not reach actions *made reviewable by statute. E.g., Abbott Laboratories v. Gardner,* 387 U.S. 136, 140 (1967); *cf. Norton v. Southern Utah Wilderness Alliance,* 124 S.Ct. 2373, 2378 (2004) ("*SUWA*").

"Any department or agency action taken pursuant to [§ 902] shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." 20 U.S.C. § 1683; *see also* 42 U.S.C. § 2000d-2 (Title VI); H.R. Rep. 88-914 (1963), *reprinted in* 1964 USCCAN 2355, 2401 (Title VI). By *statutorily* adopting judicial review generally, Title IX (like Title VI) makes rules, regulations, and orders reviewable *by statute,* outside the adequate-remedy bar.

The panel majority's reading has Congress cluttering its statutes and committee reports with meaningless statements

that "default principles apply" (*i.e.*, that judicial review – whatever it is – *may* exist elsewhere). Read that way, § 903 means the same thing, with or without its first sentence, violating the cardinal principle of statutory construction to avoid rendering any clause, sentence, or even word superfluous. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). To mean anything, § 903 must subject Title IX rules and orders to judicial review, outside the adequate-remedy bar.

The legislative history provides ample proof that § 903 provides "statutory review," which under APA's legislative history includes not only specific review provisions set out within a statute, but also common-law forms referenced and adopted by statutes. APA Leg. Hist. 276. Although judicial review under Title IX and Title VI alone warrants this Court's attention, a ruling here also would address the many instances where statutes expressly provide judicial review pursuant to the APA or to Chapter 7 of Title 5 (*i.e.*, 5 U.S.C. §§ 701-706).[12] By statutorily incorporating the default APA process (including § 704), Congress intends to enact statutory review, outside § 704's adequate-remedy bar.

Second, and more important, the legislative history of this judicial review provision clarifies not only that Congress intended judicial review, but also that there likely would not have been a Civil Rights Act of 1964 (and thus no Title IX) without judicial review. *See* 110 Cong. Rec. 2492 ("If we pick up this old provision which does not provide for judicial review I regret to say that my individual support of the legislation will come to an end") (Rep. McCulloch); C. & B. Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act*, 115-16 (1985) (providing colorful back-

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[12] *Deaf Smith County Grain Processors, Inc. v. Glickman*, 162 F.3d 1206, 1210-11 (D.C. Cir. 1998) (Edwards, J.) (statute providing judicial review "in accordance with chapter 7 of Title 5" not subject to adequate remedy bar).

ground on the foregoing statement) (reprinted at App. 223a).[13] The legislative history makes amply clear that Congress intended judicial review. 110 Cong. Rec. 16001 ("A person aggrieved (including a State or political subdivision thereof) is authorized to obtain judicial review of the action taken by a Federal department or agency either according to judicial review authority contained in the statute authorizing financial assistance or pursuant to the authority contained in the Administrative Procedure Act") (analysis prepared by Rep. McCulloch, submitted by Sen. Dirksen).[14]

The panel majority relied on a body of § 704 precedents on untimely or nonexistent agency enforcement (*i.e.*, agency inaction). *See* App. 152a (collecting cases). Because § 903 applies only to rules, regulations, and orders, petitioners' argument here *need not* unsettle those precedents. *Compare* 5

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[13] This Court has relied on the Whalen book for similar legislative history of the Civil Rights Act of 1964. *See Price Waterhouse*, 490 U.S. at 244.

[14] *See, e.g.*, 110 Cong. Rec. 6566 ("In enacting title VI, however, the House inserted many safeguards and limitations, including judicial review, in order to make certain that Federal power is not misused") (analysis by Republican members of House Judiciary Committee, inserted by Sen. Kuchel); 110 Cong. Rec. 7066 ("section 603 makes clear, in addition to the specific judicial review of any fund cutoff action, that all other agency action taken under section 602 would be subject to the same type of judicial review provided by law for similar action taken on other grounds") (Sen. Ribicoff); 110 Cong. Rec. 6987 ("A person agg.ieved (including a State or local governmental authority) is authorized to obtain judicial review of the action taken by the Federal department either according to the judicial review authority contained in the statute authorizing financial assistance or pursuant to authority contained in the Administrative Procedure Act") (analysis by Rep. McCulloch, ranking member of House Judiciary Committee, inserted by Sen. Scott); 110 Cong. Rec. 7066 ("section 603 makes clear, in addition to the judicial review of any fund cutoff action, that all other agency action taken under section 602 would be subject to the same type of judicial review provided by law for similar action taken on other grounds") (Sen. Ribicoff).

U.S.C. § 551(13) ("agency action" includes certain inaction) *with* 5 U.S.C. § 551(4), (6) ("rule" and "order" do not); *but see SUWA*, 123 S.Ct. at 2378-80 (alternate basis for same result). As Judge Williams recognized, petitioners' action therefore differs from the § 704 precedents that the majority cites. App. 152a. Indeed, it appears that all circuits that have considered judicial review of rules, regulations, and orders under Title VI or Title IX have found them reviewable.[15]

2. § 704 Does Not Immunize Officers

"[W]ithout delving [into] particulars," App. 117a, the panel majority held that § 704 precludes the various non-APA nonstatutory forms of review raised by petitioners. Because the proffered Second Amended Complaint named the "Secretary of Education" and the "Assistant Secretary for Civil Rights" in their official capacities, the missing particulars would help determine whether the majority meant that named federal *offices* are part of the "United States" for sovereign-immunity purposes or, instead, overruled blackletter law and centuries of precedent that hold that sovereign immunity does not protect federal *officers* acting *ultra vires*.

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[15] *Selden Apartments v. U.S. Dept. of Housing & Urban Dev.*, 785 F.2d 152, 157-58 (6th Cir. 1986) ("the review provisions of the [APA] are made applicable to agency action taken pursuant to civil rights laws by 42 U.S.C. § 2000d-2"); *Hillsdale Coll. v. Dep't of Health, Educ. & Welfare*, 696 F.2d 418, 420 (6th Cir. 1982) (judicial review of Title IX order), *vacated on other grounds*, 466 U.S. 901 (1984), *reinstated in pertinent part*, 737 F.2d 520 (6th Cir, 1984); *Adams v. Bell*, 711 F.2d 161, 182 & n.58 (D.C. Cir. 1983) (includes APA review within the "judicial review as may otherwise be provided by law" under Title VI); *Shannon v. U.S. Dept. of Housing and Urban Development*, 436 F.2d 809, 820 (3rd Cir. 1970) (judicial review of Title VI order); *Jones v. Tully*, 378 F.Supp. 286, 291-92 (E.D.N.Y.1974) (judicial review of Title VI order), *aff'd per curiam sub nom. Jones v. Meade*, 510 F.2d 961 (2d Cir. 1975); *Pieri v. Sec'y of Health and Human Services*, 1996 WL 73376, *1 (9th Cir.1996) (includes APA review within the "judicial review as may otherwise be provided by law" under Title VI).

Whichever particular the majority intends, it cannot stand. If the panel majority merely faulted petitioners for inadequately naming the officer defendants, then 28 U.S.C. § 1653 and controlling precedent allow petitioners to correct the jurisdictional defect, even at this stage. If, by contrast, the panel majority meant what it appears to say (namely, that § 704 applies sovereign immunity to agency officers acting *ultra vires*), then the majority conflicts with the other circuits. *E.g., Kozera v. Spirito,* 723 F.2d 1003, 1008 (1st Cir. 1983); *U.S. v. Vazquez,* 145 F.3d 74, 79-80 (2nd Cir. 1998); *Clark v. U.S.,* 691 F.2d 837, 840-41 (7th Cir. 1982); *Martinez v. Marshall,* 573 F.2d 555, 558, 560-61 (9th Cir. 1977).

In "A Blackletter Statement of Federal Administrative Law," the Section of Administrative Law and Regulatory Practice of the American Bar Association unequivocally states that "[u]nder the longstanding officer suit fiction recognized in *Ex Parte Young,* 209 U.S. 123 (1908), suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity." 54 ADMIN. L. REV. 1, 46 (2002) (hereinafter "*Blackletter Law*"). *See also Philadelphia Co. v. Stimson,* 223 U.S. 605, 620 (1912) (*Ex Parte Young* doctrine "is equally applicable to a Federal officer acting in excess of his authority").

In addition to its conflict with settled law from the circuits, *Blackletter Law,* and this Court, the majority's apparent holding also inverts the legislative intent behind the 1976 amendments and, in any event, already has been foreclosed by this Court. First, this reading would have a statute intended to *eliminate* the defense of sovereign immunity for non-monetary claims and to *increase* judicial review of agency action, *e.g.,* H.R. Rep. No. 94-1656, at 3, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6123 (House report to 1976 amendments); *Sea-Land Serv., Inc. v. Alaska R.R.,* 659 F.2d 243, 244

(D.C. Cir. 1982) (discussing legislative history), instead *sub silentio* protect wholly illegal *agency* action, but not illegal presidential, congressional, or judicial action.[16]

Second, this Court already has held that the 1976 APA amendments did not expand § 704. *Darby v. Cisneros*, 509 U.S. 137, 153 (1993). Indeed, the APA itself precludes such an argument. 5 U.S.C. § 559 ("Subsequent statute may not be held to . . . modify [§§ 701-706] except to the extent that it does so expressly"); *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999) (§ 559 requires clear evidence of legislative change). The following subsections outline *non-APA* review available, both before and after the 1976 APA amendments.

***Ultra Vires* and Unconstitutional Acts.** Judicial review lies against an officer acting without statutory authority or unconstitutionally. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 689 (1949); *Leedom v. Kyne*, 358 U.S. 184, 183-88 (1958); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963).[17] To defeat dismissal on a constitutional challenge, plaintiffs must show that "the cause of action alleged is [not] so patently without merit as to justify . . . the court's dismissal for want of jurisdiction." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70-71 (1978) (internal quotations omitted, altera-

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[16] *Swan v. Clinton*, 100 F.3d 973, 981 & n.4 (D.C. Cir. 1996) (president); *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984) (Congress); *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 901 (D.C. Cir. 1996) (courts).

[17] *Accord Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328-29 (D.C. Cir. 1996) ("Nothing in the subsequent enactment of the APA . . . repeal[s] the review of *ultra vires* actions;" "there is no sovereign immunity to waive – it never attached"); *cf. Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (allows judicial review of unconstitutional acts outside APA's waiver of sovereign immunity); *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) ("official-capacity actions for prospective relief [are not] against the [sovereign]").

tion in original). Petitioners meet that low threshold.

District Court's Equity Jurisdiction. As an alternate basis for jurisdiction, the Second Amended Complaint cites the U.S. District Court for the District of Columbia's unique equity jurisdiction, which exceeds that of other district courts and extends to federal actors headquartered here. *See, e.g., Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 580-81 (1838); *Stark v. Wickard,* 321 U.S. 288, 290 & n.1 (1944); *Peoples v. U.S. Dept. of Agriculture,* 427 F.2d 561, 564 (D.C. Cir. 1970); *Gamen v. Heckler,* 746 F.2d 844, 851 (D.C. Cir. 1984). This equity jurisdiction over federal officers derives both from the court's Maryland predecessor's common-law power over state officers, before Maryland ceded the territory to the federal government, *Gamen,* 746 F.2d at 851, *Kendall,* 37 U.S. (12 Pet.) at 580-81 ("law is unchanged, but the parties are changed"), and from the court's enabling legislation, which preserves that power. *See* Act of March 3, 1863, 12 Stat. 762 (granting court "general jurisdiction in law and equity"); Act of June 25, 1936, 49 Stat. 1921 (same); D.C. Code § 11-501 (West 2004) (granting court the "jurisdiction as a United States district court." and "any other jurisdiction conferred *by law*") (emphasis added). Neither the APA in 1946 nor the amendment to §§ 702-703 in 1976 limit this historic jurisdiction. *See* H.R. Rep. No. 94-1656, at 15-16, *reprinted in* 1976 USCCAN 6121, 6136 (Congress expressly recognizes the District of Columbia district court's continuing jurisdiction as an alternate means to sue federal officers); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985) (Congress presumed not to repeal important Supreme Court decision *sub silentio*); *see also* 5 U.S.C. § 559; *Darby,* 509 U.S. at 153.

Declaratory Judgment. In 1976, Congress amended 28 U.S.C. § 1331 to remove the amount-in-controversy threshold for "any [§ 1331] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." *Califano v. Sanders,* 430 U.S.

99, 105 (1977) (*quoting* Pub. L. 94-574, 90 Stat. 2721 (1976)); *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 183 (1997) (Ginsburg, J., dissenting); *U.S. v. Mitchell*, 463 U.S. 206, 227 & n.32 (1983). As amended,[18] § 1331 provides subject-matter jurisdiction for a judicial review of agency action, including the remedial power granted by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 ("DJA"). Under both Rule 57 and the DJA, an alternate remedy poses no bar: "the fact that another remedy would be equally effective affords no ground for declining declaratory relief." FED. R. CIV. P. 57 advisory committee note; 28 U.S.C. § 2201 (same). Moreover, the availability of such declaratory relief predates the APA, WILLIAM J. HUGHES, FEDERAL PRACTICE § 25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace it. *See* APA Leg. Hist. 37, 212, 276.

B. Alternate Remedy Is "Inadequate"

Because it falls within the "generous review provisions" that require a "hospitable interpretation" favoring judicial review, *Abbott Laboratories*, 387 U.S. at 140-41, the adequate-remedy bar "should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action." *Bowen v. Mass.*, 487 U.S. 879, 903 (1988). A "restrictive interpretation of § 704 would unquestionably . . . run counter to [the purpose of APA] § 10 and § 12 . . . to remove obstacles to judicial review." *Id.* at 902. Accordingly, this Court interprets § 704 merely to codify administrative finality and exhaustion doctrines and to ensure that the

[18] In 1980, Congress further amended § 1331 to its current form, Pub. L. 96-486, § 2(a), 94 Stat. 2369 (1980), but the amendment did not repeal the 1976 amendment. *See* H.R. Rep. No. 96-1461, at 3-4, *reprinted in* 1980 USCCAN 5063, 5065; *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (repeal by implication is disfavored).

"APA [does not] duplicate existing procedures . . . where the Congress has provided *special and adequate review procedures*" for review of agency action. *Id.* (emphasis added).

Contrary to the panel majority's reading, the APA's legislative history makes clear that § 704's first sentence merely stated the "present general state of the law" and "involve[d] no departure from the usual and well-understood rules of procedure." APA Leg. Hist. 38, 369. Those rules did not preclude a suit against the government by one injured or threatened by third-party action that the government required or authorized. *Truax*, 239 U.S. at 36-38 (alternate remedy against employer does not preclude alien's successful action against government to overturn law directing employer to meet quota on percentage of aliens in workforce); *CBS*, 316 U.S. at 422-23 (alternate future remedy does not preclude broadcasters' action against regulations applicable to station owners, where the regulations altered the terms on which station owners could interact with broadcasters). As with standing, those threatened by future injury need not wait for their alternate legal remedy to materialize, and a subsequently materializing remedy does not displace review. *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) ("settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter").

Under the then-present state of the law, an "adequate" remedy had to provide a "fair, effective, complete, and just determination of [the person's] rights." APA Leg. Hist. 275; *Gormley v. Clark*, 134 U.S. 338, 349 (1890) ("jurisdiction in equity attaches unless the legal remedy, both in respect to the *final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford* under the same circumstances") (emphasis added); Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 72, 82 (legal remedy must be "plain, adequate and complete"). A remedy is not "complete" unless it provides the same relief, which here includes rescission. *Hillsborough Tp.*,

Somerset County, N.J., v. Cromwell, 326 U.S. 620, 629 (1946) (remedy inadequate "unless it covers the entire case made by the bill in equity"). Similarly, an alternate remedy is inefficient (and thus inadequate) if it involves multiple suits.

Thus, § 704 cannot preclude a programmatic challenge to USDE's enforcement policy. Even if Title IX confines petitioners' members to enforcement against schools for Title IX violations, § 704 would not preclude judicial review of the guidelines under which those enforcement actions proceed. *Int'l Union, United Auto., Aerospace and Agr. Implement Workers of Am. v. Brock,* 477 U.S. 274, 285 (1986) ("although review of individual eligibility determinations in certain benefit programs may be confined [to other venues], claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court") (collecting cases);[19] *Nat'l Wildlife Fed'n,* 497 U.S. at 890 n.2 ("If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, . . . it can of course be challenged under the APA . . . and the entire [regulatory program] insofar as the content of that particular action is concerned, would thereby be affected"); *McNary v. Haitian Refugee Ctr., Inc.,* 498 U.S. 479, 495 (1991) (allowing judicial review that would not establish

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[19] Significantly, the *Brock* statute expressly confined judicial review to state court. Here, Title IX has an *implied private right of action,* not "special and adequate review procedure" needed to show that Congress intended to displace judicial review of unlawful federal agency action. *Compare Brock,* 477 U.S. at 285 (citing cases that allowed programmatic review, notwithstanding express limits on judicial review of individual determinations) *with Sandoval,* 532 U.S. 275, 287 (declining to expand scope of implied action); *see also Int'l Ladies' Garment Workers' Union v. Donovan,* 722 F.2d 795, 807 (D.C. Cir. 1983) (it "borders on the incredible" to contend that an implied private right of action against private parties displaces the "distinct form of proceeding" against an agency's rulemaking).

entitlement to ultimate benefit, but would entitle petitioner to reconsideration under new procedures). Given that the 1996 Clarification expressly allows capping *solely* to meet a quota, petitioners allege that USDE "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities," *Brock*, 477 U.S. at 245 (citations omitted), which is a judicially reviewable agency action, *id.*

In several instances, petitioners lack any alternate remedy altogether. Title IX prohibits only intentional gender discrimination, 20 U.S.C. § 1681(a), protected by an implied private action, *Cannon v. Univ. of Chicago*, 441 U.S. 694 (1979). The regulations require equal opportunity based on interest, 45 C.F.R. § 86.41(c)(i), but lack a private action, *Alexander v. Sandoval*, 532 U.S. 275, 285-90 (2001). Thus, even where they have a *statutory* action against schools, petitioners' members lack one under the more generous regulations, where they need only prove greater interest in common men's sports like track and wrestling than in less-common ones like women's equestrian and crew. *See, e.g., Cameron v. Mullen*, 387 F.2d 193, 201 & n.28 (D.C. Cir. 1967) (*habeas corpus* petition's burden of "proof beyond a reasonable doubt" inadequate to displace civil commitment hearing's more generous *de novo* review).

The lack of a regulatory remedy is most acute for club programs (*e.g.*, Yale) that seek varsity status. The applicable statute of limitations precludes a legal remedy for statutory discrimination (*i.e.*, cutting the team in 1991), Conn. Gen. Stat. § 52-577 (2004), and *Sandoval* precludes a private action for regulatory violations (*i.e.*, failing to elevate the club team to varsity status, based on interest, today). 532 U.S. at 285-90. As young adults aged approximately 18 to 23 today, and children aged approximately 8 to 13 when the three-year statute ran in 1994, Yale wrestlers lacked both the legal capacity and constitutional standing to file a timely action against Yale University. With *no alternate remedy*, § 704 poses

no barrier. APA Leg. Hist. 37 (APA review available when the alternate remedy does not cover the situation). A similar dilemma confronts coaches, alumni, boosters, and fans who wish either to help maintain an existing team or to reinstate a cut one: they lack statutory Title IX rights against schools for their injuries. Alumni and fans also often face a financial injury: budget-restricted schools believe that the Three-Part Test requires them to pay for a women's team to balance out the men's team that they seek to maintain or reinstate, effectively doubling the cost of assisting a team. Finally, schools have no alternate remedy (*i.e.*, they cannot sue themselves).

CONCLUSION

Because petitioners have alleged sufficient facts to support standing at the Rule 12(b)(1) stage and because the APA and Title IX waive sovereign immunity (which does not attach as to the officers in any event), this Court should grant this petition for a writ of *certiorari*.

Janury 6, 2005

Respectfully submitted,

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

APPENDIX

United States District Court for the
District of Columbia Circuit.

National Wrestling Coaches Association, Committee to Save Bucknell Wrestling, Marquette Wrestling Club, Yale Wrestling Association, and College Sports Council,

Plaintiffs,

v.

Department of Education,

Defendant.

No. 02-0072-EGS
Filed June 11, 2003

Before: SULLIVAN, District Court Judge.

MEMORANDUM OPINION

I. INTRODUCTION

Plaintiffs, National Wrestling Coaches Association ("NWCA"), Committee to Save Bucknell Wrestling ("CSBW"), Marquette Wrestling Club ("MWC"), Yale Wrestling Association ("YWA"), and College Sports Council ("CSC") are associations representing male intercollegiate and scholastic athletes, coaches, and alumni. They commenced this action for declaratory judgment and injunctive relief to enjoin the U.S. Department of Education ("DoE") from enforcing Title IX, which prohibits sex discrimination in education, in a manner they contend results in discrimination against male athletes. Specifically, plaintiffs maintain that the Department's current enforcement policies lead educational institutions to cut men's sports teams, artificially limit the number of participants on men's teams, and otherwise impermissibly

discriminate against men based on sex in the provision of athletic opportunities, thereby denying male athletes and other interested parties the equal protection of laws.

Accordingly, plaintiffs, on behalf of their members, challenge the agency's "1979 Policy Interpretation" and "1996 Clarification," pursuant to which Title IX and its regulations are currently enforced. Plaintiffs contend that both of these policy statements violate the Equal Protection component of the Due Process Clause of the Fifth Amendment, and exceed the agency's regulatory authority under the statute by requiring the very discrimination the statute prohibits. Moreover, plaintiffs allege that the 1996 "Clarification" effectively amended the substantive provisions of the 1975 Title IX regulations under the guise of interpretation and clarification without formal rulemaking, thus violating the Administrative Procedure Act (APA). Plaintiffs also maintain that procedural infirmities in promulgation of both the 1979 Policy Interpretation and the 1996 Clarification render both documents null and void.

Plaintiffs seek declaratory and injunctive relief vacating the 1996 Clarification and the 1979 Policy Interpretation, compelling the Department of Education to conduct formal notice and comment rulemaking "consistent with Title IX, the U.S. Constitution, and this Court's declaratory relief in this action," and staying all "disparate-impact components" of Title IX regulations until a new final rule is promulgated.

Currently pending before this Court are defendant's motion to dismiss and plaintiffs' opposed motion for leave to file a second amended complaint.

Upon careful consideration of the motions, the responses and replies thereto, the oral arguments of counsel, the entire record herein, as well as the governing statutory and case law, and for the following reasons, it is by the Court hereby

ORDERED that the plaintiffs' motion for leave to file a second amended complaint is hereby **DENIED**; and it is

FURTHER ORDERED that the defendant's motion to dismiss is hereby **GRANTED**.

A. Parties

NWCA is a not-for-profit corporation representing the interests of collegiate and scholastic wrestling coaches. First Am. Compl. ¶ 4.

CSBW is an unincorporated not-for-profit association of student-athletes attending Bucknell University in Lewisburg, PA, as well as Bucknell University alumni, formed to advocate for maintenance or reinstatement of Bucknell University's intercollegiate wrestling program. *Id.* ¶ 5. Its members include students who competed on the university's 2001-2002 men's wrestling team. *Id.*

MWC is an unincorporated not-for-profit association of student-athletes attending Marquette University in Milwaukee, WI, along with alumni of the University, formed to raise funds to support Marquette's men's wrestling program. *Id.* ¶ 6.

YWA is an unincorporated not-for-profit association, formed to provide financial support to the men's wrestling program at Yale University in New Haven, CT, and to seek reinstatement of men's wrestling as an intercollegiate varsity sport at the University. *Id.* ¶ 7.

CSC is a not-for-profit District of Columbia corporation which serves as an umbrella organization for groups representing the interests of collegiate coaches and athletes, and includes among its members the national collegiate coaches' associations for men's and women's swimming, track and field, wrestling, and men's gymnastics. *Id.* ¶ 8.

Defendant DoE, is the federal agency responsible for implementation and enforcement of Title IX, 20 U.S.C. § 1681-1688, the federal statute prohibiting discrimination

based on sex in educational programs and activities receiving federal financial assistance.

The National Women's Law Center ("NWLC"), American Volleyball Coaches Association, International Women's Lacrosse Coaches Association, National Fastpitch Softball Coaches Association, Women's Basketball Coaches Association, American Association of University Women, and Women's Sports Foundation, moved for and were granted permission to participate as *amici curiae* in this case. All are organizations asserting an interest in the achievement of equal opportunities for women and girls in athletics, and filed briefs in support of defendant's motion to dismiss.

Also participating as *amicus curiae* is the Independent Women's Forum ("IWF"), a nonprofit organization advocating for "individual liberty and responsibility, self-governance, the superiority of the market economy, and ... equal opportunity for all." IWF joins plaintiffs in opposing defendant's motion to dismiss, principally advancing arguments on the merits of plaintiffs' claims.

B. Procedural History

DoE filed a motion to dismiss plaintiffs' claims for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), on the grounds that plaintiffs lack standing to bring their claims under Article III of the U.S. Constitution, and that their action is barred on sovereign immunity and statute of limitations grounds.

Plaintiffs cross-moved for summary judgment in their response to the defendant's motion to dismiss. However, by Order dated July 25, 2002, proceedings on plaintiffs' motion for summary judgment were stayed until the question of subject matter jurisdiction was resolved.

The Court heard oral argument on defendant's motion to dismiss on October 15, 2002. Presumably in an effort to correct the jurisdictional defects alleged by defendant,

plaintiffs moved for leave to file a Second Amended Complaint. On January 16, 2003, plaintiffs filed a "Notice of Petition," advising the Court that plaintiff CSC had petitioned the Secretary of Education, pursuant to 5 U.S.C. § 553(e) of the APA,[1] seeking repeal of the 1979 Policy Interpretation and 1996 Clarification.

II. STATUTORY AND REGULATORY FRAMEWORK

In light of the complexity of the regulatory scheme through which Title IX has been implemented and enforced over the past 30 years, as well as the significance of the statute's substantive and procedural history to plaintiffs' claims, the Court will first engage in a comprehensive review of the Title IX statutory and regulatory framework before directly addressing plaintiffs' claims.

A. Title IX

Title IX was enacted as part of the Education Amendments of 1972, following extensive hearings on discrimination in education, during which over 1200 pages of testimony were gathered, documenting "massive, persistent patterns of discrimination against women" in colleges and universities. Pub.L. No. 92- 318, §§ 901-905, 86 Stat. 373-75 (1972); 118 Cong. Rec. 5804 (daily ed. Feb. 28, 1972) (statement of Sen. Bayh). The objectives of the statute are two-fold: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704, 99

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[1] The APA provides, in relevant part, that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. 553(e) (2003).

S.Ct. 1946, 1961, 60 L.Ed.2d 560 (1979). Section 901 of Title IX, which is patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits discrimination based on sex in federally funded educational programs and activities. Pub.L. No. 92-318, § 901, codified at 20 U.S.C. § 1681 (2003); 118 Cong. Rec. 5802, 5803, 5807 (daily edition Feb. 28, 1972) (statement of Sen. Bayh); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 514, 529, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). It provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....

20 U.S.C. § 1681. The statute expressly precludes a finding of discrimination based solely on statistical evidence of gender disparities in athletic programs:

> Nothing contained in ... this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federal program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.

Id.; Cohen v. Brown Univ., 991 F.2d 888, 894-95 (1st Cir.1993) [hereinafter "Cohen I"]. This statutory language does not, however, preclude any consideration of statistical disparities in the adjudication of a Title IX claim, as evidenced by the *proviso* immediately following:

> *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical

> evidence tending to show that such imbalance exists with respect to participation in, or receipt of benefits of, any such program or activity by members of one sex.

20 U.S.C. § 1681.

Federal agencies, such as DoE, providing financial assistance to educational programs or activities are authorized and directed to effectuate the provisions of Section 1681 by

> issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

20 U.S.C. § 1682 (2003).

The "ultimate sanction" for non-compliance with the statute is termination of federal funding or denial of future federal grants.[2] *Id., North Haven Bd. of Educ. v. Bell*, 456 U.S.

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[2] Congress expressed a strong preference for voluntary compliance with Title IX, as evidenced by the following language in 20 U.S.C. § 1682:

No such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

Consistent with this statutory preference, DoE "has not terminated its funding for any postsecondary institution for violation of title IX," but rather has secured compliance through "complaint investigations, compliance reviews, and the issuance of policy guidance." Gender Equity: Men's and Women's Participation in Higher Education, General Accounting Office, GAO 01-128 at 5 (December 2000) ("GAO Report").

(Footnote cont'd on next page)

at 514, 102 S.Ct. 1912. The statute expressly enables "any person aggrieved" by an agency's termination of funding based on a finding of non-compliance with the statute to seek judicial review of such agency action. 20 U.S.C. § 1683 (2003). Further, "private lawsuits have played an important role in Title IX enforcement." *Gender Equity: Men's and Women's Participation in Higher Education,* General Accounting Office, GAO 01-128 at 5 (December 2000) [hereinafter "GAO Report"]; *Cannon v. Univ. of Chicago,* 441 U.S. 677, 717, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (recognizing implied private right of action to enforce Title IX).

B. 1975 Regulations

Two years after Title IX was passed, Congress enacted the Education Amendments of 1974, directing the Secretary of Health, Education, and Welfare ("HEW"), DoE's predecessor agency, to promulgate regulations implementing Title IX, which were to "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub.L. No. 93-380, § 844, 88 Stat. 484, 612 (1974).

In 1975 HEW published final Title IX regulations ("1975 Regulations"), which remain in effect. 40 Fed.Reg. 24,128 (June 4, 1975); codified at 45 C.F.R. §§ 86.1-86.71 (2003). Promulgation of the final regulations followed a four month period during which over 9,700 public comments regarding proposed regulations published in the Federal Register on

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(Footnote cont'd from previous page.)

The agency's "approach to enforcement emphasizes collaboration and negotiation." Id.

June 20, 1974 were accepted and considered. *Id.* The regulatory provision specifically addressing federally funded athletic programs provides, in relevant part:

> A recipient ... shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the Director will consider, among other factors:
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes ...

45 C.F.R. § 86.41(c). This section lists nine additional factors an agency may consider when determining whether a funded entity is complying with the regulations by making equal opportunities available in athletics. *Id.* These factors include provision of equipment and supplies, as well as physical, coaching, medical, training, housing and dining facilities and services, scheduling of games and practice times, travel and *per diem* allowances, opportunity to receive academic tutoring, and publicity. *Id.* The regulations also provided for a three year "adjustment period" from the date of promulgation to allow affected educational institutions to come into compliance. 45 C.F.R. § 86.41(d). The 1975 HEW Regulations were approved by President Gerald Ford on May 27, 1975. 40 Fed.Reg. 24,137 (June 4, 1975).

C. 1979 Policy Interpretation

Several months after the expiration of the three year "adjustment period," HEW issued a proposed policy interpretation to, *inter alia,* further explain the concept of "equal athletic opportunity" embodied in the 1975 Regulations and "provide further guidance on what constitutes compliance with the law." 43 Fed.Reg. 58,070 (Dec. 11, 1978); *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics,* 44 Fed.Reg. 71,413 (December 11, 1979) [hereinafter "1979

Policy Interpretation"]. After accepting over 700 comments from the public and visiting eight universities to determine how the proposed policy and suggested alternatives would apply in actual practice, the agency promulgated a final policy, dubbed the "1979 Policy Interpretation." 44 Fed.Reg. 71,413.

The proposed Policy Interpretation noted that HEW had, at that time, "received 93 complaints alleging that more than 62 institutions of higher education were not providing equal athletic opportunities for women." 43 Fed.Reg. at 58,071. The purpose of the final 1979 Policy Interpretation was described as follows:

> this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.
>
> ...
>
> The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory.

44 Fed.Reg. 71,413, 71,414.[3]

The 1979 Policy Interpretation emphasizes that, although it "does not contain a separate section on institutions' future responsibilities [,] ... institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available." 44 Fed.Reg. 71,414. This language has been interpreted as indicating that the 1979 Policy Interpretation was designed to assist institutions in "self-policing" their compliance with Title IX. *See, e.g. Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 612 (6th Cir.2002); *Kelley v. Bd. of Trustees, Univ. of Ill.*, 35 F.3d 265, 268 (7th Cir.1994). Significantly, the 1979 Policy Interpretation concludes that, "[i]n most cases, this will entail development of athletic programs that *substantially expand opportunities for women* to participate and compete at all levels." *Id.* (emphasis added).

Finally, the 1979 Policy Interpretation is "designed specifically for intercollegiate athletics," but emphasizes that "its general principles will often apply to club, intramural,

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[3] The 1979 Policy Interpretation sets forth three general areas in which Title IX is applied to athletic programs: scholarships, equivalent treatment, and equivalent accommodation. 44 Fed.Reg. 71,415, 71,417. A Title IX violation "may be shown by proof of a substantial violation in *any one* of the three major areas of investigation set out in the Policy Interpretation." *Pederson v. La. State Univ.*, 213 F.3d 858, 879 (5th Cir.2000) (citation omitted); *see also Boulahanis v. Bd. of Regents*, 198 F.3d 633, 635 (7th Cir.1999) ("an 'institution may violate Title IX solely by failing to accommodate the interests of both sexes.' ") (citations omitted). Plaintiffs' challenge, and therefore this opinion, focuses on the third general area of inquiry set forth in the 1979 Policy Interpretation, equivalent accommodation.

and interscholastic athletic programs, which are also covered by the regulation." 44 Fed.Reg. 71,413.

The 1979 Policy Interpretation states that, with respect to the first of the ten factors identified in the 1975 Regulations as determinative of whether an institution is providing "equal opportunity" in its athletic program, i.e. "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," 45 C.F.R. § 86.41(c)(1), recodified at 34 C.F.R. § 106.41(c)(1) (2003), the agency will conduct an "Overall Determination of Compliance," during which it will ascertain

> (a) whether an institution's policies are discriminatory in language or effect;
> (b) whether the institution's program as a whole includes substantial and unjustified disparities in the opportunities or treatment afforded to male and female athletes; and
> (c) whether segments of the institution's program include disparities in the treatment and opportunities that are substantial enough to deny equality of athletic opportunity.

44 Fed.Reg. 71,418. Moreover, the agency will assess compliance with the "interests and abilities" factor of the ten-factor equal opportunity test by examining:

> a. The determination of athletic interests and abilities of students;
> b. The selection of sports offered; and
> c. The levels of competition available including the opportunity for team competition.

44 Fed.Reg. 74,417.

In order to assess students' athletic interests and abilities, the 1979 Policy Interpretation permits institutions to use "any non-discriminatory method," provided that:

(a) the process takes into account the nationally increasing levels of women's interests and abilities;
(b) the methods do not disadvantage the members of the underrepresented gender;
(c) the methods of determining ability consider team performance records; and
(d) the methods are responsive to the expressed interests of the students of the underrepresented gender capable of intercollegiate competition.

44 Fed.Reg. 71,417.

With respect to the selection of sports offered, "the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women." 44 Fed.Reg. 71,417-18. Rather, the 1979 Policy Interpretation sets forth a framework for effective accommodation of student interests when selecting athletic offerings within contact sports and non-contact sports. *Id.*

The examination of the third criterion, "levels of competition available, including the opportunity for team competition," under the 1979 Interpretation is informed by the agency's view that:

> In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

44 Fed.Reg. 74,418. According to the 1979 Policy Interpretation, compliance with this directive is achieved by demonstrating one of the following, under what has become known as the "Three Part Test":

> (1) ...intercollegiate level participation opportunities for male and female athletes are provided in numbers substantially proportionate to their

respective enrollments; or
(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes ... the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
(3) Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above,... it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Id. [hereinafter "Three Part Test"].

D. Department of Education Organization Act

The Department of Education Organization Act of 1979 divided the former HEW into two new agencies: DoE and the Department of Health and Human Services. Pub.L. No. 96-88, 93 Stat. 669, 671 (1979); 20 U.S.C. § 3411 (2003); E.O. 12212, 45 Fed.Reg. 29557 (May 2, 1980). In so doing, it provided that, "in carrying out any function transferred by this Act, the Secretary, or any officer or employee of the Department, may exercise any authority available by law ... to the official or agency from which such function was transferred ...." 20 U.S.C. § 3471(a) (2003); *see also* 20 U.S.C. § 3507 (2003)(references in other statutes to the functions or officials of HEW "shall be deemed to refer to the Secretary, official, or other component of the Department to which this Act transfers such functions."). The Act also expressly stipulated that

"[a]ll orders, determinations, rules, [and] regulations ... issued ... or allowed to become effective by the President [or] any Federal

> department or agency or official thereof, ... in the performance of functions, which are transferred under this Act to the Secretary or the Department, and ... which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside or revoked in accordance with the law by the President, the Secretary, or other authorized official ...."

20 U.S.C. § 3505(a) (2003).

Accordingly, DoE promulgated a rule recodifying under a new Title 34 of the Code of Federal Regulations those HEW regulations which were transferred to DoE. 45 Fed.Reg. 30,802 (May 9, 1980). The 1975 Regulations implementing Title IX were recodified without substantial change at 34 C.F.R. § 106.41 (2003).[4]

E. 1996 Clarification

On May 9, 1995, the House Subcommittee on Postsecondary Education, Training and Life-long Learning of the Economic and Educational Opportunities Committee held a hearing on Title IX and the Three Part Test. On June 7, 1995, 142 Members of Congress wrote the Assistant Secretary for Civil Rights for DoE, the Honorable Norma V. Cantú, expressing concern that educational institutions were complying with the Three-Part Test by eliminating men's athletic opportunities to achieve "substantial proportionality" of opportunity under the first prong of the

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[4] The regulations promulgated by the former HEW remain in effect, under the oversight of the Department of Health and Human Services ("HHS"). *See* 45 C.F.R. § 86.41.

Three Part Test rather than by increasing women's athletic opportunities.

In response to "requests for specific guidance about existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics," DoE subsequently sent a proposed "clarification" of the 1979 Policy Interpretation to over 4,500 interested parties as an enclosure to a letter from Ms. Cantú addressed "Dear Colleague." *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test* (Sep. 20, 1995) (*transmitted by* Letter from Norma V. Cantú, Assistant Sec'y, Office for Civil Rights, Department of Education (Sep. 20, 1995)); *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test* (Jan. 16, 1996) (*transmitted by* Letter from Norma V. Cantú, Assistant Sec'y, Office for Civil Rights, Department of Education). A Notice in the Federal Register announced the availability of the draft clarification. 60 Fed.Reg. 51,460 (Oct. 2, 1995). The letter transmitting the proposed Clarification explicitly emphasized that, by issuing the requested "guidance," DoE was "not revisiting the Title IX regulation or the Title IX Policy Interpretation." *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test* (Sep. 20, 1995) (*transmitted by* Letter from Norma V. Cantú, Assistant Sec'y, Office for Civil Rights, Department of Education (Sep. 20, 1995)). Public comment was solicited only with respect to the narrow question of "whether it provides the appropriate clarity in areas that have generated questions." *Id.* The letter of transmittal also emphasized that the Clarification focused on the Three Part Test, which it described as "a test used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics." *Id.*

After review of over 200 public comments on the 1995 Draft Clarification, DoE released a final version of the Clarification on January 16, 1996. *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test* (Jan. 16, 1996)

(*transmitted by* Letter from Letter from Norma V. Cantú, Assistant Sec'y, Office for Civil Rights, Dep't of Educ.) [hereinafter "1996 Clarification"]. DoE's Office for Civil Rights recognized that it had received comments suggesting that the Clarification, as well as the Three Part Test it addressed, were substantively flawed, but reiterated that it had only requested comments regarding whether the document provided necessary clarity, and that "it would not be appropriate to revise the 1979 Policy Interpretation." *Id.*

The final 1996 Clarification "provides specific factors that guide an analysis of each part of the three-part test. In addition, it provides examples to demonstrate, in concrete terms, how these factors will be considered." *Id.* Certain provisions of the 1996 Clarification are of particular importance to the issues raised by this litigation. For instance, the 1996 Clarification emphasizes that the "Three-Part Test" provides an institution with "three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, [DoE's Office of Civil Rights] will determine that the institution is meeting this requirement." *Id.* at 2. It goes on to underscore that the requirement addressed by the "Three-Part Test," the provision of nondiscriminatory participation opportunities, is only one of many factors considered under the 1975 Regulations to determine if an institution is in compliance with the intercollegiate athletics provision of Title IX. *Id.* Other factors considered under the 1975 Regulations and the 1979 Policy Interpretation include, *inter alia,* the quality of competition offered, as well as coaching, equipment, facilities, recruitment, and scheduling. *Id.*

Of particular concern to plaintiffs is language used in the 1996 Clarification describing the first prong of the Three Part Test as a "safe harbor." The letter of transmittal

accompanying the final version of the 1996 Clarification states

> The first part of the test--substantial proportionality--focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities.

Letter from Norma V. Cantú, Assistant Sec'y, Office for Civil Rights, Dep't of Educ. (Jan. 16, 1996) at 2. It immediately goes on to say that, if an institution does not meet the first prong of the Three Part Test, it "may comply with Title IX by satisfying either part two or part three of the test." *Id.* The words "safe harbor" do not appear anywhere in the language of the final 1996 Clarification itself.

Plaintiffs also emphasize that the 1996 Clarification does not prevent the practice of "capping" (limiting the number of participants on a team) or eliminating men's teams as part of a funded entity's overall efforts at compliance. Specifically, the letter of transmittal states:

> The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men ... Ultimately, Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.

Letter from Norma V. Cantú, Assistant Sec'y, Office for Civil Rights, Dep't of Educ. (Jan. 16, 1996) at 4.

Finally, citing to the language of the 1979 Policy Interpretation, the 1996 Clarification outlines the manner in which the number of "participation opportunities" for each sex is determined for purposes of the first part of the "Three-

Part Test," making it clear that the number of actual athletes on a team, as opposed to the number of slots available on a team, is used. *Id.* at 3 (citing 44 Fed.Reg. at 71,415).

F. Intervening History

It is undisputed that Title IX, as enforced by HEW and subsequently by DoE, has had a tremendous impact on women's opportunities in intercollegiate athletics, and thus has enabled women to reap the myriad benefits of participation in athletic programs.[5]

The General Accounting Office reports that the number of women participating in intercollegiate sports grew from 30,000 in 1972 to 157,000 in the 1997-98 school year. *Id.* at 5. Over the same time period, men's overall participation

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[5] See generally, Gender Equity: Men's and Women's Participation in Higher Education, General Accounting Office, GAO 01-128 (December 2000); see also Neal v. Bd. of Tr. of Cal. State Univ., 198 F.3d 763, 769 (9th Cir.1999) ("The percentage of college athletes who are women rose from 15% in 1972 to 37% in 1998, and Title IX is at least partially responsible for this trend of increased participation by women."); Cohen v. Brown Univ., 101 F.3d 155, 188 (1st Cir.1996) [hereinafter "Cohen II"] ("There can be no doubt that Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports. In addition, there is ample evidence that increased athletic participation opportunities for women and young girls, available as a result of Title IX enforcement, have had salutary effects in other areas of societal concern."); Cohen I, 991 F.2d at 891 ("For college students, athletics offers an opportunity to exacuate leadership skills, learn teamwork, build self-confidence, and perfect self-discipline. In addition, for many student-athletes, physical skills are a passport to college admissions and scholarships, allowing them to attend otherwise inaccessible schools. These opportunities, and the lessons learned on the playing fields, are invaluable in attaining career and life successes in and out of professional sports.").

dropped only slightly, from 248,000 to 234,000. *Id.* Much, however, remains to be done in order to achieve substantial equality and eliminate continuing systemic discrimination. Although during the 1998-1999 school year, NCAA member schools spent more money on athletic scholarships for women than for men, they spent more money on average per male intercollegiate sports participant in terms of recruiting, coaching, and operations. *Id.* For instance, although women represent 53% of undergraduates at Division I schools, they are afforded only 41% of available athletic participation opportunities, 36% of athletic operating budgets, and 32% of recruiting dollars. Brief of *Amici Curiae* National Women's Law Center, *et al.* [hereinafter "NWLC Brief"] at 13-14 (quoting *NCAA 1999-2000 Gender Equity Report* (2002) at 20). Moreover, women's overall participation in intercollegiate sports remains below pre-Title IX male participation. *Id.* at 14.

Although Title IX's application to collegiate athletic programs which do not receive direct financial assistance from the federal government was once in question, *see Grove City Coll. v. Bell,* 465 U.S. 555, 104 S.Ct. 1211, 79 L.Ed.2d 516 (1984), the Civil Rights Restoration Act of 1987 firmly re-established institution-wide coverage, making it crystal clear that Title IX applies to athletic programs operated by any school receiving federal funding for any of its educational programs and activities, and not just to those athletic programs which directly received federal dollars. Pub.L. No. 100- 259, 102 Stat. 28 (1988). In so doing, Congress re-emphasized the importance of Title IX as a tool for creating a more level playing field for women. *See, e.g.,* 130 Cong. Rec. S12,642 (daily ed. Oct. 2, 1984) (statement of Sen. Byrd) (highlighting past discrimination against women athletes); 130 Cong. Rec. S11,253 (daily ed. Sep. 17, 1984) (statement of Sen. Hatch) (emphasizing the importance of Title IX to ensuring development of women athletes); 130 Cong. Rec. S2,267 (daily ed. Mar. 2, 1984) (statement of Sen. Riegle)

(pointing to extensive evidence of sex discrimination in education and athletics).

Since that time, Title IX, its regulations, and the 1979 Policy Interpretation have survived constitutional challenges in no fewer than eight federal Circuits. *See Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir.2002); *Pederson v. La. State Univ.*, 213 F.3d 858, 879 (5th Cir.2000); *Neal v. Bd. of Tr. of the Ca. State Univ.*, 198 F.3d 763, 770 (9th Cir.1999); *Cohen II*, 101 F.3d 155, 170; *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 274-75 (6th Cir.1994); *Kelley v. Bd. of Tr., Univ. of Ill.*, 35 F.3d 265, 270 (7th Cir.1994); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir.1993); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir.1993); *Cohen I*, 991 F.2d 888. In each of these cases, the regulatory pronouncements challenged here, whether raised offensively or defensively, were found to be consistent with the Equal Protection component of the Due Process Clause of the Fifth Amendment, as well as with the statute itself, and thus entitled to deference by the courts. *See, e.g., Horner v. Ky. High Sch. Ass'n*, 43 F.3d at 273; *Cohen I*, 991 F.2d at 896-97, 899-900. One Circuit Court went so far as to find that the third prong of the Three Part Test "draws its essence from the statute." *Cohen I*, 991 F.2d at 899 (noting that, in the overall context of the statute and regulations, "[w]hile any single element of this tripartite test, in isolation, might not achieve the goal set by the statute, the test as a whole is reasonably constructed to implement the statute. No more is exigible."). Moreover, upon consideration of many of the same arguments advanced by plaintiffs here, courts have held that the 1979 Policy Interpretation and the 1996 Clarification do not establish "quotas" or impermissibly discriminate against men or men's teams. *See, e.g., Cohen II*, 101 F.3d at 169-70, 172, 176, 184-85 ("Title IX is not an affirmative action statute; it is an anti-discrimination statute .... No aspect of the Title IX regime at issue in this case--inclusive of the statute, the relevant regulation, and the

pertinent agency documents [including the 1979 Policy Interpretation and the 1996 Clarification]--mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals. Like other anti-discrimination statutory schemes, Title IX *permits* affirmative action."); *see also Chalenor v. Univ. of N.D.*, 291 F.3d at 1043; *Pederson v. La. State Univ.*, 213 F.3d at 878-79; *Kelley v. Bd. of Tr.*, 35 F.3d at 271.

These cases are easily divided into two distinct categories. First, there are those cases most characteristic of standard Title IX enforcement, in which, pursuant to Title IX's implied private right of action against a funded institution for violation of the statute,[6] women, as the underrepresented sex in an institution's athletic program, challenged some conduct on the part of the school which adversely affected their opportunities to participate in athletics. *See, e.g. Pederson v. La. State Univ.*, 213 F.3d at 864; *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d at 268, 270; *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d at 826; *Cohen I*, 991 F.2d at 892-93, 905. In such cases, educational institutions have raised challenges to the 1975 Regulations and 1979 Policy Interpretation, and specifically, the Three Part Test, as defenses. In so doing, they have argued that the 1979 Policy Interpretation and its Three Part Test go beyond the statute, exceed the agency's authority, and violate Equal Protection principles by discriminating against the overrepresented sex,

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[6] Although Title IX does not include a citizen-suit provision authorizing enforcement by private individuals, but rather provides only for termination of federal funding upon a finding that a funded entity is discriminating in contravention of the statute, 20 U.S.C. § 1682, the U.S. Supreme Court has held that an implied private right of action exists. *Cannon v. Univ. of Chicago*, 441 U.S. at 703, 709, 717, 99 S.Ct. 1946.

or men. *See, e.g., Pederson v. La. State Univ.*, 213 F.3d at 878; *Cohen I*, 991 F.2d at 899-901; *Roberts v. Colo. State*, 998 F.2d at 826. Pursuant to the Supreme Court's decisions in *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) and *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984), courts adjudicating such cases accord considerable deference to DoE's interpretation of the statute, as manifested in the 1975 Regulations and 1979 Policy Interpretation. *See Cohen I*, 991 F.2d at 895 ("The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX;" citing to 1974 Education Amendments); *see also Roberts v. Colo. State*, 998 F.2d at 828. The Three Part Test has consistently been found to be worthy of such deference, as well as enforcement, based on findings that it does not violate the statute or regulations, exceed the agency's statutory authority, or offend constitutional principles of Equal Protection. *Cohen II*, 101 F.3d at 172-73, 175; *Cohen I*, 991 F.2d at 900-01.

The second category of cases, more frequent as of late, involves challenges brought by male athletes who contend that actions taken by educational institutions, in some cases in response to findings by DoE's Office of Civil Rights that their programs did not afford women equal athletic opportunities, violate Title IX and constitutional Equal Protection principles by impermissibly discriminating against men. *See, e.g., Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d at 609-10; *Chalenor v. Univ. of N.D.*, 291 F.3d at 1042, 1043; *Boulahanis v. Bd. of Regents*, 198 F.3d at 634-36; *Neal v. Bd. of Tr. of Cal. State Univ.*, 198 F.3d at 763, 765; *Kelley v. Bd. of Tr.*, 35 F.3d at 265, 267, 270; *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d at 168, 170. In such cases, notwithstanding contentions that DoE's regulatory pronouncements were not entitled to deference because they

were contrary to the statute, courts have also afforded "appreciable deference" to the agency's interpretation of the 1975 Regulations embodied in the 1979 Policy Interpretation and, where before the court, the 1996 Clarification. *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d at 614- 15; *Chalenor v. Univ. N.D.*, 291 F.3d at 1046; *Boulahanis v. Bd. of Regents*, 198 F.3d at 637-38; *Neal v. Bd. of Tr. of Cal. State Univ.*, 198 F.3d at 770-71; *Kelley v. Bd. of Tr.*, 35 F.3d at 270; *Williams v. Sch. Dist.*, 998 F.2d at 171. Deference in these cases is also premised on explicit findings that the 1975 Regulations are neither "arbitrary ... [n]or manifestly contrary to the statute," and that the 1979 Policy Interpretation is a reasonable interpretation of those regulations. *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d at 614-15; *Chalenor v. Univ. N.D.*, 291 F.3d at 1046-47; *Neal v. Bd. of Tr.*, 198 F.3d at 771; *Kelley v. Bd. of Tr.*, 35 F.3d at 270-72 (quoting *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 839, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

With respect to the Equal Protection arguments made by male plaintiffs, courts have found collateral attacks on Title IX and its regulations through challenges to university action taken in compliance therewith to be impermissible, and direct challenges to Title IX and the 1975 Regulations as violative of the Constitution to be without merit. *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d at 613-14; *Neal v. Bd. of Tr.*, 198 F.3d at 772-73; *Boulahanis v. Bd. of Regents*, 198 F.3d at 639; *Kelley v. Bd. of Tr.*, 35 F.3d at 272. Noting that, "[e]ven absent a specific finding that discrimination has occurred, remedial measures mandated by Congress are 'constitutionally permissible to the extent that they serve important governmental objectives ... and are substantially related to achievement of those ends,' " courts have found both prongs of the intermediate scrutiny standard to have been satisfied by the implementation of Title IX under the 1975 Regulations and 1979 Policy Interpretation. *Boulahanis*

v. Bd. of Regents, 198 F.3d at 639; *Kelley v. Bd. of Tr.,* 35 F.3d at 272.

Regardless of whether the plaintiffs were women or men alleging discrimination on the basis of sex in the provision of athletic opportunity, in each of these cases the defendant was a federally funded institution, be it a secondary school, athletic association, college, or university. Where an agency's authority to promulgate specific regulations pursuant to Title IX has been challenged, the plaintiff has been a regulated party or association of regulated parties. *See, e.g., N. Haven Bd. of Educ. v. Bell,* 456 U.S. at 512, 517, 102 S.Ct. 1912. (challenge to HEW's authority to issue regulations governing educational institutions' employment practices pursuant to Title IX); *Nat'l Collegiate Athletic Ass'n v. Califano,* 622 F.2d 1382 (10th Cir.1980); *Romeo Cmty. Sch. v. U.S. Dept. of H.E.W.,* 600 F.2d 581 (6th Cir.1979). The parties have cited no cases, and indeed this Court is aware of none, in which similarly situated plaintiffs have directly challenged the validity of the 1975 Regulations, 1979 Policy Interpretation, or 1996 Clarification by way of an action brought against the Department of Education, or its predecessor HEW. *See* Tr. Hr'g 10/15/02 at 80.

III. PLAINTIFFS' CLAIMS

A. Statutory and Constitutional Claims

Essentially, plaintiffs' complaint is that DoE's interpretation of Title IX and the 1975 Regulations, as memorialized in the 1979 Policy Interpretation and 1996 Clarification, have "directly and indirectly ... reduced (and continue to limit) participation opportunities for male athletes" by eliminating men's athletic teams altogether or by "arbitrarily" limiting the number of participants on men's teams. First Am. Compl. ¶ 48. Plaintiffs contend that this result has been accomplished by means of DoE's initiation of "hundreds of administrative enforcement actions and

investigations at institutions where athletic participation rates did not match enrollment rates by gender, but where no student has alleged discrimination." *Id.* They allege that these enforcement actions and investigations, allegedly initiated with respect to institutions which did not comply with Title IX under the first prong of the Three Part Test, have led to "negotiated settlements with ... institutions that reduced male participation opportunities." *Id.* Finally, plaintiffs contend that, even in the absence of investigations and enforcement actions by DoE, institutions have, in an effort to avoid such actions, voluntarily reduced men's participation opportunities. *Id.*

Specifically, plaintiffs allege that Bucknell University eliminated its men's intercollegiate wrestling team effective in the 2002-03 academic year solely to bring the institution in compliance with Title IX, and in particular with the first prong of the Three Part Test. First Am. Compl. ¶ 50. Plaintiffs further assert that the University expressly articulated this rationale for its action in a press release issued on May 2, 2001. *Id.* Plaintiffs further assert that Marquette University eliminated its men's intercollegiate wrestling team, notwithstanding the fact that it had been privately funded since 1993, in order to comply with Title IX, and that the University's athletic director "indicated that Marquette might bring back its wrestling program if the legal requirements changed." First Am. Compl. ¶ 51. Finally, plaintiffs contend that Yale's decision to demote its intercollegiate men's varsity wrestling team to "club status," ostensibly for budgetary reasons despite an offer to endow the team, was made "because of Title IX." First Am. Compl. ¶ 52.

In Counts I and II of their First Amended Complaint, plaintiffs allege, referring to the 1979 Policy Interpretation's Three Part Test and the 1996 Clarification, that neither Title IX nor its implementing regulations authorize DoE to issue a "rule" which permits institutions to engage in gender-

conscious cutting or capping of teams to achieve compliance with regulatory standards. Plaintiffs further contend that such a rule permits intentional sex-based discrimination which is not substantially related to the achievement of an "important government objective," thereby violating both constitutional Equal Protection principles and the language of Title IX. Plaintiffs also object to the comparison of gender proportions in the general student body and in athletic programs embodied in the first prong of the Three Part Test, arguing that the comparison contravenes the language of the statute and regulations.[7] Accordingly, plaintiffs maintain that the 1979 Policy Interpretation and the 1996 Clarification violate Title IX, the 1975 Regulations, and principles of Equal Protection embodied in the Due Process Clause of the Fifth Amendment of the U.S. Constitution.

Plaintiffs raise several additional claims which essentially take a different procedural route to make the same arguments on the merits.

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[7] Specifically, plaintiffs refer to 20 U.S.C. § 1681(b), which provides in relevant part,

> Nothing contained in ... this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federal program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area ...

and the 1979 Policy Interpretation itself, which authorizes institutions to assess students' athletic interests by any "reasonable method" deemed appropriate. 44 Fed.Reg. 71,417.

B. Unlawful Denial of Petition to Amend or Repeal

In addition to the facial challenge to the 1979 Policy Interpretation and 1996 Clarification made in the first two counts of plaintiffs' First Amended Complaint, plaintiffs also challenge DoE's refusal to amend or repeal the Three Part Test despite a request to do so made by plaintiff NWCA during the 1996 Clarification comment process. Specifically, plaintiffs allege that a letter from Plaintiff NWCA, addressed to DoE's Assistant Secretary for Civil Rights, and written in response to the proposed 1996 Clarification, is a "petition to amend or repeal" as that term is used under the APA, 5 U.S.C. § 553(e) (2003). First Am. Compl. ¶ 74. Plaintiffs further argue that, by issuing the final 1996 Clarification, DoE summarily denied NWCA's petition, and that such denial constituted final agency action that was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law," thus violating the APA. *Id.* ¶ 77.

C. Abdication Claim

The First Amended Complaint also alleges in Count IV that, by promulgating and enforcing the 1979 Policy Interpretation and the 1996 Clarification, which permit "gender-conscious cutting and capping," DoE has abdicated its statutory duty to enforce Title IX's prohibition against intentional discrimination based on sex. Plaintiffs contend that such "abdication" of DoE's enforcement responsibilities constitutes final agency action subject to judicial review.

D. Procedural Defects

Finally, plaintiffs contend that, by dint of procedural defects, DoE's implementing regulations, 34 C.F.R. § 106.1-106.71, the 1979 Policy Interpretation, and the 1996 Clarification are null and void, and are of no force or effect. Counts V, VI, and VII allege that DoE implementing regulations (as opposed to the HEW implementing

regulations), the 1979 Policy Interpretation and 1996 Clarification constitute new "implementing regulations" or substantive rules which are null and void because they were not approved by the President or his designate as expressly required by the language of Title IX, 20 U.S.C. § 1682, and because they were not promulgated pursuant to the requisite notice and comment rulemaking procedures.

Plaintiffs contend that these alleged constitutional, statutory, and regulatory violations on the defendant's part can be redressed by entry of a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02,[8] the APA, 5 U.S.C. § 706(2),[9] and Fed.R.Civ.P. 57, finding that:

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[8] The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 provides, in relevant part, that

In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201 (2003). "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202 (2003).

[9] Under the APA, a court reviewing agency action "shall" hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;

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I. Title IX does not authorize adoption of a "disparate impact" standard as a surrogate for intentional discrimination;

II. DoE is prohibited from requiring or authorizing educational institutions to engage in "gender-conscious" cutting or capping to meet a disparate impact standard;

III. to the extent that gender conscious decisions regarding athletic programs are permitted, educational institutions are to use athletic interest and ability, not enrollment, as the relevant population;

IV. the relevant unit of "athletic opportunity" under the regulations is a spot on a team, not an athlete on a team;

V. DoE unlawfully denied plaintiff NWCA's petition to amend or repeal the "Three-Part Test" and to revise its enforcement policies to reflect the manifestly changed circumstances in 1996;

VI. DoE, by its 1996 Clarification consciously and expressly adopted a general policy which abdicates its statutory duty to prevent intentional gender discrimination;

VII. DoE's Title IX implementing regulations, the 1979 Policy Interpretation, and the 1996 Clarification are null and void.

Additionally, plaintiffs request that this Court issue an order

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(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
5 U.S.C. § 706(2) (2003).

I. vacating the 1996 Clarification and the "Three-Part Test" as arbitrary and capricious, and promulgated without following the procedures required by law;

II. instructing DoE to conduct notice-and-comment rule-making to amend its Title IX implementing regulations with respect to intercollegiate athletics in a manner consistent with Title IX, the Constitution, and the declaratory relief requested;

III. retaining this Court's jurisdiction over the matter until such rules are promulgated and become effective;

IV. staying "all disparate impact components" of DoE's Title IX "rules" concerning athletics until new rules are promulgated;

V. Awarding plaintiffs attorneys' fees and costs.

IV. MOTION TO DISMISS

Defendant moves to dismiss this action pursuant to Fed.R.Civ.P. 12(b)(1), alleging that this Court lacks subject matter jurisdiction over plaintiffs' claims. Specifically, defendant contends that plaintiffs lack standing under Article III of the United States Constitution because they cannot demonstrate that the relief they seek will redress the injuries they claim. Def.'s Mot. to Dismiss at 2. In the alternative, the defendant submits that, even if this Court were to find standing, plaintiffs' constitutional and statutory claims fall outside the scope of the waiver of sovereign immunity embodied in the APA and the applicable statute of limitations, plaintiffs fail to allege facts sufficient to establish jurisdiction under the APA provision governing petitions to amend or repeal regulations, 5 U.S.C. § 553(e), and all of plaintiffs' remaining claims are time-barred to the extent they concern the 1979 Policy Interpretation. *Id.* at 3-4, 25-30, 31-33.

This Circuit has recently reiterated the standard governing motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(1):

> A complaint may be dismissed for lack of subject matter jurisdiction only if " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " In our review, this court assumes the truth of the allegations made and construes them favorably to the pleader.

Empagran S.A. v. F. Hoffman-LaRoche, Ltd., 315 F.3d 338 (D.C.Cir.2003). In the Rule 12(b)(1) context, the plaintiff bears the burden of establishing the Court's jurisdiction. *See, e.g., Tripp v. Executive Office of the President*, 200 F.R.D. 140, 142 (D.D.C.2001); *Vanover v. Hantman*, 77 F.Supp.2d 91, 98 (D.D.C.1999). In so doing, the plaintiff may rely on, and the Court may consider, materials outside of the pleadings without converting a motion to dismiss to one for summary judgment. *See* Fed.R.Civ.P. 12(b)(1); *Land v. Dollar*, 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947) ("[W]hen a question of the District Court's jurisdiction is raised, either by a party or by the court on its own motion ... the court may inquire, by affidavits or otherwise, into the facts as they exist."); *Teva Pharmaceuticals, USA, Inc. v. U.S. Food and Drug Admin.*, 182 F.3d 1003, 1008 (D.C.Cir.1999); *Artis v. Greenspan*, 158 F.3d 1301, 1305-06 (D.C.Cir.1998).

A. Motion to Amend Complaint

Several weeks after oral argument was heard on defendant's motion to dismiss, plaintiffs filed a motion for leave to file a Second Amended Complaint ("Pl.'s Mot."). In their proposed Second Amended Complaint, plaintiffs seek to expand their allegations in several key areas. First, they seek to add the Secretary of Education and the Assistant Secretary of Civil Rights, in their official capacities, as defendants to this action. Proposed Second Amended

Complaint for Declaratory and Injunctive Relief ("Second Amended Compl.") ¶ 1.

Second, plaintiffs request leave to amend their allegations regarding the composition of plaintiff associations. For instance, plaintiffs now seek to allege that plaintiff NWCA, in addition to "representing the interests of collegiate and scholastic wrestling coaches," First Am. Compl. ¶ 4, now includes among its membership not only "member coaches," *id.*, but also "coaches, alumni, and the general public ... [and] federally funded colleges, universities, high schools, and associations of high schools that are directly affected by the Title IX rules challenged in this action." Second Am. Compl. ¶ 4. In support of these proposed allegations, plaintiffs submit an affidavit from Patrick A. Tocci, II NWCA's Director of Administration, who affirms that NWCA counts among its members colleges, universities, high schools and high school associations in more than 35 states, which, upon information and belief, receive federal funding. Tocci Decl. ¶ 3. Additionally, Mr. Tocci specifically alleges that Muhlenberg College and Northwestern University are members of plaintiff NWCA. *Id.* ¶ 4, Supp. Tocci Decl. ¶ 3. Also, plaintiffs wish to add that Bucknell Wrestling's members include Jacob E. O'Donnell, Class of '05, who was a member of Bucknell's men's intercollegiate wrestling team during the 2001-02 season, and who wishes to compete for the University during the 2002-03, 2003-04, and 2004-05 seasons.

Third, plaintiffs' proposed Second Amended Complaint seeks to add, as sources of authority for granting the requested relief, 28 U.S.C. §§ 1331, 1343(a)(4),[10] 1346(a)(2),

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[10] 28 U.S.C. § 1343 (2003). Civil Rights and elective franchise

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1361,[11] the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended),[12] D.C.Code § 11-501,[13] and the Court's equitable powers.

Fourth, the proposed Second Amended Complaint would amend Count IV to include a claim that the promulgation of the 1979 Policy Interpretation and 1996 Clarification not only represent an abdication of DoE's obligation to enforce Title IX's prohibition against sex-based discrimination, but also constitute *ultra vires* acts undertaken by the agency. Second Am. Compl. ¶¶ 103-05, Prayer for Relief ¶ 126 A(vii).

Finally, plaintiffs' Second Amended Complaint seeks to add numerous and significant factual allegations. For instance, the Second Amended Complaint would include substantially expanded allegations regarding DoE's

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(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

(4) To recover damages or secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

[11] 28 U.S.C. § 1361 (2003) provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

[12] The Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921, reorganized and set forth the powers and jurisdiction of the courts of the District of Columbia.

[13] D.C.Code § 11-501 (2003) sets forth the civil jurisdiction of the United States District Court for the District of Columbia above and beyond its jurisdiction as a United States District Court.

enforcement actions since 1996. Second Am. Compl. ¶¶ 58-61, 63. Specifically, plaintiffs would allege that,

> on information and belief, on or about January 5, 2000, [DoE] negotiated and entered into a compliance agreement with Northwestern University that requires Northwestern either to meet prong one of the Three-Part Test ... by June 30, 2002 or to conduct a survey of the interests and abilities of female (but not male) students to demonstrate compliance with the Three-Part Test, as revised by the 1996 Clarification ... As a result of the compliance agreement, with [DoE's] knowledge, monitoring, and assent, Northwestern has imposed caps on men's teams that affect members of Plaintiffs NWCA and CSC, including without limitation the men's swimming and wrestling coaches at Northwestern.

Second Am. Compl. ¶ 61. Plaintiffs would also rely on a report by the General Accounting Office, which they contend documents acknowledgments by educational institutions, some of which are members of plaintiff organizations, that men's teams are cut in order to comply with the Three Part Test, as well as recent Circuit Court opinions noting that defendant educational institutions justified elimination of men's athletic programs as part of an effort to comply with the Three Part Test. Second Am. Compl. ¶¶ 64, 69-70.

Additionally, plaintiffs now wish to contend that the 1996 Clarification represented the first pronouncement by DoE that it, like its predecessor HEW, would evaluate interscholastic athletic programs' compliance with Title IX under the Three Part Test. Second Am. Compl. ¶¶ 52, 79, 121. Similarly, they contend that the 1996 Clarification represents the agency's first acknowledgment subsequent to the U.S. Supreme Court's decision in *Grove City v. Bell* and

the enactment of the Civil Rights Restoration Act that the Three Part Test applies to athletic departments which do not directly receive federal funds. Second Am. Compl. ¶ 53. The Second Amended Complaint also submits that the 1996 Clarification's interpretation of the third prong of the Three Part Test is substantially different from that contained in the agency's 1980 enforcement manual, prepared for and used by DoE investigators. Second Am. Compl. ¶¶ 54, 80, 122.

Plaintiffs further wish to allege that, although DoE prepared enforcement manuals in 1980 and 1990, it did not publish them or incorporate them by reference in the Federal Register. Second Am. Compl. ¶ 42. Plaintiffs also seek to include allegations regarding the procedure by which the 1996 Clarification was developed and disseminated, noting that DoE did not follow any procedure previously published in the Federal Register with respect to the process by which the final 1996 Clarification was developed, nor did it publish the final 1996 Clarification in the Federal Register. Second Am. Compl. ¶¶ 55, 56, 99.

Finally, plaintiffs wish to add an allegation that "institutions, athletic directors, and coaches who are members" of plaintiff organizations must engage in conduct which violates Title IX in order to comply with DoE's interpretation of the statute and regulations, but cannot "sue themselves" to obtain a remedy for this alleged injury to them. Second Am. Compl. ¶ 71. They also seek to contend that enforcement actions against schools are not effective remedies for their student-athlete members because "schools typically announce cutting and capping decisions in the Spring after the deadline for applying to transfer."

Fed.R.Civ.P. 15(a) governs plaintiffs' motion for leave to file a Second Amended Complaint. Under that Rule, in the current procedural posture, plaintiffs may only amend their complaint upon leave of the court or by written consent of the adverse party. Fed.R.Civ.P. 15(a). However, the Rule

mandates that "leave shall be freely given when justice so requires." *Id.* The D.C. Circuit has provided further guidance with respect to the application of this standard, holding that "a district court should grant leave to amend a complaint '[i]n the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, futility of amendment, etc.' Within these bounds, a district court has discretion to grant or deny leave to amend under Rule 15(a)." *Atchinson v. District of Columbia,* 73 F.3d 418, 425-26 (D.C.Cir.1996) (quoting *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)).

It is clear from the language cited above that Fed.R.Civ.P. 15(a) and D.C. Circuit precedent do not compel the grant of leave to amend a complaint in every instance. *See Graves v. United States,* 961 F.Supp. 314, 317 (D.D.C.1997). The Court need only base its ruling on a valid ground when exercising its discretion. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962); *James Madison Ltd. v. Ludwig,* 82 F.3d 1085, 1099 (D.C.Cir.1996).

"Courts may deny a motion to amend a complaint as futile ... if the proposed claim would not survive a motion to dismiss." *James Madison Ltd. v. Ludwig,* 82 F.3d at 1099; *see also Atchinson v. District of Columbia,* 73 F.3d at 425; *Moldea v. N.Y. Times,* 22 F.3d 310, 319 (D.C.Cir.1994); *Price v. Phoenix Home Life Ins. Co.,* 44 F.Supp.2d 28, 33 (D.D.C.1999), *aff'd,* 203 F.3d 53, 1999 WL 1021927 (D.C.Cir.1999) (table, text in Westlaw); *Mittleman v. United States,* 997 F.Supp. 1, 10 (D.D.C.1998); *Graves v. United States,* 961 F.Supp. at 317; *Monroe v. Williams,* 705 F.Supp. 621, 623-24 (D.D.C.1988) (citing cases). For instance, in *James Madison Ltd.,* the D.C. Circuit upheld the District Court's denial of a motion for leave to amend a complaint to add counts challenging on Due Process grounds the statute under which the Federal Deposit Insurance Corporation placed several banks under

receivership. *James Madison Ltd. v. Ludwig,* 82 F.3d at 1099. The court found that, on the facts alleged in the complaint, there had been no due process violation. *Id.* Similarly, The D.C. Circuit has upheld denial of permission to amend a complaint to assert claim of false light invasion of privacy where plaintiff's claim for defamation could not survive summary judgment. *Moldea v. N.Y. Times,* 22 F.3d at 319-20. In so holding, the court stated that the plaintiff could not avoid the constitutional requirements of a defamation claim by asserting related causes of action. *Id.* Where an original complaint asserting claims under 42 U.S.C. § 1983 explicitly named a police officer as a defendant in his official capacity only, but, on the eve of trial, plaintiff sought to amend the complaint to name the officer as a defendant in his individual capacity, a District Court found, *inter alia,* that such an amendment would be futile because the officer would be immune from liability under the doctrine of qualified immunity. *Atchinson v. District of Columbia,* 73 F.3d at 424 (Circuit Court expressly did not consider District Court finding that amendment would be futile). And, where the Civil Service Reform Act and the Privacy Act provided exclusive remedies for the injuries claimed by a plaintiff, the District Court denied a motion for leave to amend the complaint to add claims under 42 U.S.C. § 1985(1) and the Fifth Amendment, on the grounds that such an amendments would be futile as the claims would not survive a motion to dismiss. *Mittleman v. United States,* 997 F.Supp. at 10-11.

Plaintiffs have also sought, as do plaintiffs here, to add additional defendants and factual allegations, as well as additional counts, on motions for leave to file amended complaints brought pursuant to Fed.R.Civ.P. 15(a). *See, e.g., Mount v. Baron,* 154 F.Supp.2d 3, 7-8 (D.D.C.2001); *Graves v. United States,* 961 F.Supp. 314, 317 (D.D.C.1997). Where, notwithstanding the proposed addition of new defendants and claims, a proposed amended complaint failed to allege any facts demonstrating proximate causation, simultaneous

grant of a motion to dismiss and denial of a motion for leave to amend the complaint was deemed appropriate. *See, e.g., Mount v. Baron,* 154 F.Supp.2d at 7-10. Similarly, where a proposed amendment to the complaint would add new defendants, but plaintiff failed, as a matter of law, to allege any conduct on the part of those defendants amounting to conspiracy to deprive plaintiff of his civil rights, motion for leave to amend was denied while defendants' motion to dismiss was granted. *Graves v. United States,* 961 F.Supp. at 317-18.

Amendments proposed to cure jurisdictional defects have likewise been denied where "the plaintiff's amendment is futile because the claims encompassed by it will not cure the deficiencies of the original complaint, namely lack of subject matter jurisdiction." *Price v. Phoenix Home Life Ins. Co.,* 44 F.Supp.2d at 33 (denying plaintiff leave to add state law claims where original complaint failed to allege facts sufficient to sustain diversity or federal question jurisdiction).

Defendant contends that plaintiffs' proposed amendments are futile because they do not correct the jurisdictional defects alleged in the motion to dismiss, and that plaintiffs' motion should therefore be denied and the motion to dismiss granted. In order to evaluate these contentions, as well as plaintiffs' responses thereto, plaintiffs' proposed amendments will each be considered in turn, in addition to the allegations contained in the First Amended Complaint, in the discussion of the merits of defendant's motion.

B. Standing

As an initial matter, DoE argues that this court is without subject matter jurisdiction over plaintiffs' action because plaintiffs lack standing to bring their claims. All of the plaintiffs in this action are membership organizations, and must therefore either establish standing in their own

right or on behalf of their members. *See Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d at 1387.

The D.C. Circuit has recently reiterated the associational standing rule established by the U.S. Supreme Court, holding that

> [a]n association only has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Fund Democracy, LLC v. Securities and Exchange Commission, 278 F.3d 21, 25 (D.C.Cir.2002) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 704, 145 L.Ed.2d 610 (2000)). Because this requirement is jurisdictional in nature, the Court must satisfy itself that plaintiffs have indeed made allegations sufficient to support associational standing.

Defendant does not directly address plaintiffs' assertion of associational standing because it contends that plaintiffs have not met the threshold requirement of demonstrating that their "members would otherwise have standing to sue in their own right."[14] Def.'s Mot. at 11, citing *Fund*

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[14] Plaintiffs misunderstand defendant's position as conceding that plaintiffs have met the other elements of associational standing. Pl.'s Opp'n at 7, n. 6. Plaintiffs nevertheless contend that they have met all three prongs of the associational standing test. Pl.'s Opp'n at 7, n. 6. Because defendant's arguments with respect to plaintiffs' members' Article III standing do not dispose entirely of plaintiffs' claims, the Court will consider whether plaintiffs have sufficiently alleged all prongs of the associational standing test.

Democracy, 278 F.3d at 25. Defendant emphasizes, relying on Supreme Court precedent of long standing, that plaintiffs' status as associations seeking to bring claims on behalf of their members "does not eliminate or attenuate the constitutional requirements of a case or controversy." *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Plaintiffs, as associations, can, however, establish standing so long as their members, "or any one of them," would have standing to bring their claims. *Id.*

In their proposed Second Amended Complaint, plaintiffs seek to add the allegation that plaintiff NWCA is itself injured by the defendant's conduct, contending that, as an organization supported by membership dues, it is harmed when the number of dues-paying members decreases because educational institutions discontinue their wrestling programs in response to the 1979 Policy Interpretation and the 1996 Clarification. *See* Second Am. Compl. ¶ 4; Tocci Decl. ¶¶ 5-6. Therefore, both NWCA's standing as an organization, as well as its associational standing must be considered in order to resolve defendant's motion.

1. **Article III standing**

The Supreme Court has held that the "irreducible constitutional minimum of standing" requires satisfaction of three elements:

> First and foremost, there must be alleged (and ultimately proved) an "injury in fact"--a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be causation--a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability--a likelihood that the requested relief will redress the alleged injury. This triad of injury in fact, causation,

> and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence.

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-04, 118 S.Ct. 1003, 1016-1017, 140 L.Ed.2d 210 (1998) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that the general allegations embrace those specific facts which are necessary to support the claim.' " *Lujan v. Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct. 2130. Plaintiffs' standing to bring each of their claims will now be evaluated in turn.

COUNTS I & II CONSTITUTIONAL AND STATUTORY CHALLENGES

a. Injury-in-fact

In each of these counts, plaintiffs allege that Title IX's regulations, the 1979 Policy Interpretation, and the 1996 Clarification have directly and indirectly reduced and limited participation opportunities for male athletes, thus presenting a concrete harm to their student-athlete members. *See* First Am. Compl. ¶ 48, Count I, Count II.

Specifically, plaintiffs contend that the 1979 Policy Interpretation's "Three-Part Test" denies their student-athlete members the equal protection of laws by encouraging institutions to cut or cap men's teams to comply with Title IX under the first prong, expand women's athletic opportunities without expanding men's opportunities under the second prong, or "fully accommodate" women's athletic interests without "fully accommodating" men's interests under the third prong. Pl.'s Opp'n at n. 4 and accompanying text, 9. Plaintiffs contend their student-athlete members are therefore placed on an

"unequal footing" compared to women, which in turn invades a legally protected interest of plaintiffs' members in a particularized manner. Pl.'s Opp'n at 9, *citing Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (claims alleging denial of equal protection of laws give rise to an injury preventing plaintiffs "from competing on an equal footing").

Plaintiffs also allege that the challenged regulations and interpretations have forced their coach and athletic director members to serve as unwitting instruments of discriminatory actions by requiring them to cut and "cap" men's teams. First Am. Compl. ¶ 50; Pl.'s Opp'n at 10-11. Although the D.C. Circuit cases cited by plaintiffs do not necessarily hold that persons forced to engage in discriminatory conduct suffer an injury in their own right as a result of being so compelled,[15] it is conceivable that

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[15] See Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 350 (D.C.Cir.1998) (commenting that "forced discrimination itself may be an injury," citing a Ninth Circuit case, but holding that church instead had third party standing: "when the law makes a litigant an involuntary participant in a discriminatory scheme, the litigant may attack that scheme by raising a third party's constitutional rights. There can be no doubt that the Church [as an employer] has standing to make its Fifth Amendment challenge [to FCC equal employment opportunity regulations]."). This reading of the Lutheran Church holding is supported by the Circuit's opinion in Fraternal Order of Police v. United States, 152 F.3d 998, 1002 (D.C.Cir.1998), the other case relied upon by plaintiffs, in which the court held "where a person is effectively used by the government to implement a discriminatory scheme, he may, as we held in [Lutheran Church] 'attack that scheme by raising a third party's constitutional rights.' "

Plaintiffs also allege a direct injury to their member-coaches arising from potential exposure to liability under Title IX based on their participation in efforts to comply with the challenged policies. See Pl.'s Opp'n at 11.

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coaches in particular potentially suffer a direct economic harm through loss of employment if, as plaintiffs allege, the challenged regulations lead educational institutions to cut men's teams. *See* Pl.'s Opp'n at 11, First Am. Compl. ¶¶ 4, 8, 48. Moreover, the cases cited by plaintiffs lend support to the notion that coaches and athletic directors have third party standing to assert the rights of student athletes against whom they are allegedly "forced" to discriminate. *See Fraternal Order of Police v. United States,* 152 F.3d 998, 1002 (D.C.Cir.1998); *Lutheran Church-Missouri Synod v. FCC,* 141 F.3d 344, 350 (D.C.Cir.1998).

Plaintiffs submit that their alumni and spectator members suffer an injury to their "aesthetic interest" in particular men's teams and sports. Pl.'s Opp'n at 10. However, plaintiffs allege no specific facts and cite no authority in support of the standing of these particular members. For instance, plaintiffs do not allege that their alumni and spectator members have in the past attended sporting events which are no longer available as a result of defendant's conduct. Nor have they alleged that plaintiffs' members would attend such events were they to again become available pursuant to relief afforded by this Court. It would therefore appear that under *Lujan,* plaintiffs have not alleged facts sufficient to establish injury-in-fact for their

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However, the D.C. Circuit appears to have found that potential legal liability does not constitute a direct injury- for purposes of standing analysis, preferring to ground standing for similarly situated plaintiffs in third party standing. See Fraternal Order of Police, 152 F.3d at 1002 (recognizing supervising officers' potential liability for failure to comply with challenged statute, holding that supervising officers had third party standing).

alumni and spectator members. *Lujan*, 504 U.S. at 562-64, 112 S.Ct. 2130 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. But the injury-in-fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."); *see also American Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros.*, 317 F.3d 334 (D.C.Cir.2003) (plaintiff expressed desire and intent to visit elephants in the future).

Nevertheless, injury-in-fact to "any one" of plaintiffs' members is sufficient to meet the requirements of the associational standing test. *Warth v. Seldin*, 422 U.S. at 511, 95 S.Ct. 2197. It appears beyond dispute that plaintiffs have sufficiently alleged that at least some of their members, at a minimum student-athletes and coaches, are currently sustaining injuries that are concrete, particularized, direct, and immediate, and not conjectural or hypothetical. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. at 102-04, 118 S.Ct. 1003. Defendant does not contend otherwise.

Were plaintiffs' motion for leave to file the Second Amended Complaint granted, plaintiffs would also allege that their educational institution members have suffered injury-in-fact as a result of DoE's conduct. Second Am. Compl. ¶ 4. Specifically, plaintiffs would aver that plaintiff NWCA's member institutions, among others, "have cut hundreds of men's teams and capped hundreds of men's participation opportunities," and therefore have been injured by being "forced to serve ... as the involuntary participants" in a discriminatory scheme. Second Am. Compl. ¶¶ 64, 65, 71. While, as noted above, if accepted as true, these allegations may be sufficient to confer third party standing on institutions to assert the rights of their student athletes, under D.C. Circuit precedent it is unclear whether such allegations rise to the level of injury-in-fact to the institutions themselves. *See Fraternal Order of Police v. United*

States, 152 F.3d at 1002; *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d at 350.

Perhaps more importantly, plaintiffs fail to specify which of their institutional members have been harmed by serving as involuntary participants in a discriminatory scheme, and under what circumstances. While Muhlenberg College is named in the declaration accompanying the proposed Second Amended Complaint as one specific institutional member among many, there is no mention of any action taken by Muhlenberg College in response to the 1979 Policy Interpretation or 1996 Clarification. *See* Tocci Decl. ¶ 4. Therefore, there is no conceivable basis for asserting an injury-in-fact to this institutional member of plaintiff NWCA, nor for the College to have third party standing to challenge the 1979 Policy Interpretation or 1996 Clarification on behalf of its student athletes.

Recognizing the liberal pleading requirements reflected in the Federal Rules of Civil Procedure and the governing case law, the Court remains cognizant that "[i]t is the responsibility of the complainant to clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Renne v. Geary*, 501 U.S. 312, 316, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991). While we must presume that "general allegations embrace those specific facts which are necessary to support the claim," *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130, we are not required to fill in critical *lacunae* in plaintiffs' allegations. This is particularly true where, as here, those facts are uniquely within plaintiffs' knowledge, and therefore failure to allege them with sufficient specificity to provide notice of the precise basis for standing to maintain this suit cannot be overlooked.

Plaintiffs do make specific allegations regarding Northwestern University's efforts to comply with the 1979 Policy Interpretation and 1996 Clarification, and attach a

voluntary agreement entered into between Northwestern and DoE's Office of Civil Rights ("OCR"). Second Am. Compl. ¶ 61. However, nowhere in the Second Amended Complaint or the declaration accompanying it do plaintiffs allege how they contend Northwestern University, as opposed to its student athletes and coaches, was harmed by entering into the settlement agreement beyond the generalized claim, discussed above, that it was "forced to serve" as an instrument of unlawful discrimination.

Nevertheless, the Court need not resolve the question of whether the allegations of the Second Amended Complaint are sufficient as a matter of law to establish injury-in-fact with respect to either plaintiff NWCA as an organization, or its educational institution members, as it finds that the allegations made in the First Amended Complaint, claiming denial of athletic opportunity on the basis of sex, are sufficient to establish injury-in-fact, at least with respect to plaintiffs' student-athlete and coach members. Moreover, even if injury-in-fact to NWCA and its educational institution members is presumed based on the allegations of the Second Amended Complaint, for the reasons outlined below, the Court finds that these allegations fail to support plaintiffs' standing on causation and associational standing grounds, respectively.

b. Causation and Redressability

The D.C. Circuit has succinctly articulated the analysis to be applied under the second and third prongs of the Article III standing test as follows:

> Causation, or "traceability" examines whether it is substantially probable that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff. Redressability examines whether the relief sought, assuming that the court chooses to grant it, will

likely alleviate the particularized injury alleged by the plaintiff.

Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 663-64 (D.C.Cir.1996) (en banc). Although causation and redressability are two separate prongs of the constitutional standing test, they are often addressed together, particularly in cases such as this. *See Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 418 (D.C.Cir.1994) ("When plaintiffs' claim hinges on the failure of government to prevent another party's injurious behavior, the 'fairly traceable' and redressability inquiries appear to merge.").

Defendant's main argument in support of the motion to dismiss is that plaintiffs cannot establish redressability on the facts alleged in the First Amended Complaint, while *amici* National Women's Law Center *et al* focus on the causation aspect of the standing inquiry. *See* Def.'s Mot. at 12, 13; NWLC Brief at 2. In support of their contention that the 1979 Policy Interpretation and the 1996 Clarification are the cause of their injuries, and that the relief requested would redress their harm, plaintiffs allege that, as part of its efforts to enforce the Three Part Test of the 1979 Policy Interpretation and the 1996 Clarification, DoE has initiated "hundreds" of investigations and administrative enforcement actions at funded educational institutions. First Am. Compl. ¶ 48. Plaintiffs contend that, as a direct result of DoE's enforcement efforts, educational institutions have negotiated settlement agreements with DoE which have reduced male participation opportunities. First Am. Compl. ¶ 48. Plaintiffs also allege that, in an effort to avoid such enforcement actions, institutions have preemptively limited male participation opportunities under the belief that doing so would bring them into compliance with the Three Part Test. *Id.*

Plaintiffs specifically allege that both Bucknell University and Marquette University expressly cited

compliance with Title IX, and in the case of Bucknell, particularly the first part of the "Three-part Test," as the primary reason for cutting their men's wrestling teams. First Am. Compl. ¶¶ 50-51. Finally, plaintiffs allege "on information and belief" that compliance with Title IX informed Yale University's decision to cut its wrestling program despite an offer to endow the program through private funding. First Am. Compl. ¶ 52. Plaintiffs argue that striking down the 1996 Clarification and the Three Part Test of the 1979 Policy Interpretation, as well as issuing a judicial declaration that it is unlawful under Title IX for DoE to authorize institutions to engage in gender-conscious "cutting and capping," would redress their injuries by removing offending agency interpretations while leaving in place gender-neutral statutory and regulatory protections against intentional discrimination. First Am. Compl. ¶ 53.

Plaintiffs' allegations and argument focus primarily on the first prong of the Three Part Test, which they characterize as a "quota," requiring "equal participation" based on enrollment rather than the "equal opportunity" based on interest envisioned by the 1975 Regulations. First Am. Compl. ¶¶ 49, 53. Plaintiffs maintain that the existence of the so-called "quota" embodied within the first prong of the Three Part Test was a substantial factor, if not the only factor, motivating decisions by institutions such as Bucknell to intentionally discriminate against men by cutting men's athletic teams. *Id.*

Plaintiffs also allege that, under circumstances where men's actual interest in athletics is greater than women's, compliance with the second or third prong of the Three Part Test also constitutes unlawful discrimination against men. Pl.'s Opp'n at 9; First Am. Compl. ¶ 65. Under such circumstances, if an institution complies with the second prong of the Three Part Test, it will expand women's athletic opportunities without a concomitant expansion of men's opportunities, notwithstanding greater interest in athletics

among men. Similarly, an institution complying with the third prong of the Three Part Test will fully accommodate women's interests in athletics without fully accommodating men's interests, regardless of whether men's interests are greater. Therefore, plaintiffs contend that, no matter which prong of the Three Part Test an institution seeks to comply with, its compliance constitutes unlawful discrimination on the basis of sex in violation of Title IX.

Both parties concede that plaintiffs are, in large part, challenging third-party conduct, namely that of educational institutions seeking to comply with Title IX as currently enforced. *See* Def.'s Mot. at 13; Pl.'s Opp'n at 9. As the U.S. Supreme Court pointed out in *Lujan,*

> [w]hen ... a plaintiff's injury arises from the government's allegedly unlawful regulation ... of someone else ... causation and redressability ordinarily hinge on the response of the regulated ... third party to the government action ... The existence of ... standing depends on the unfettered choices made by independent actors not before the courts ... whose exercise of broad and legitimate discretion the courts cannot presume to control or predict, and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 562, 112 S.Ct. 2130.

Plaintiffs nevertheless contend that the conduct on the part of educational institutions which results in the injuries

alleged is the direct result of DoE's promulgation and enforcement of the 1979 Policy Interpretation and the 1996 Clarification.[16] *See* Pl.'s Opp'n at 9. Arguing that exercise of institutional discretion under DoE's Title IX enforcement scheme is confined to selecting among the three options offered by the Three Part Test, all of which injure their members by placing them on an "unequal footing," plaintiffs assert that the Three Part Test so constrains the choices of educational institutions that the "third parties" in question have no option but to unlawfully harm plaintiffs. *See* Pl.'s Opp'n at 9, n. 9; Tr. Hr'g 10/15/02 at 113.

Noting that indirectness of injury, while not necessarily fatal to standing, may make it "substantially more difficult" to establish, defendant responds that plaintiffs are unable to demonstrate that it is likely, and not merely speculative, that invalidation of DoE's interpretation of Title IX, as manifested through the Three Part Test and 1996

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[16] Plaintiffs do contend that, in cases where DoE has entered into settlement agreements requiring compliance with the first part of the "Three-Part Test," DoE "directly" causes the resulting injuries. However, the decisions creating the circumstances triggering a DoE investigation or enforcement action, as well as the need for a settlement agreement in the first place, are uniquely within the discretionary purview of third party educational institutions. Third party educational institutions also ultimately decide whether to enter into such settlement agreements or forego federal funding and contest DoE's interpretation and enforcement of Title IX in an action under 20 U.S.C. § 1682 (authorizing judicial review of an agency action "terminating or refusing to grant or to continue federal assistance"). Therefore, plaintiffs' student athlete and coach members cannot claim to be "directly regulated" by DoE through such agreements, nor can they circumvent causation/redressability questions by alleging direct injury as a result of settlement agreements voluntarily negotiated by third party educational institutions with DoE.

Clarification, will redress their injuries. *See* Def.'s Mot. at 14-18, n. 2. Defendant contends that a number of other factors, some of which will continue to operate regardless of whether the Court awards the relief requested, inform the decisions of the educational institutions subject to the challenged regulations. *See* Def.'s Mot. at 14-18, n. 2. DoE places particular emphasis on the premise that educational institutions would still be bound by and subject to liability under Circuit Court decisions upholding DoE's interpretation of Title IX, and concludes on this basis that they are therefore unlikely to cease the conduct at issue should this Court declare the challenged interpretations invalid. Def.'s Mot. at 15; Def.'s Reply at 4.

However, plaintiffs correctly counter that if the Court awards the entirety of the relief requested, the challenged interpretations of Title IX and the 1975 Regulations would in effect be repealed, and DoE would be required to promulgate new rules and interpretations which do not authorize compliance with Title IX through any of the means set forth in the Three Part Test. As a result, Circuit opinions upholding and deferring to DoE's current interpretation of Title IX and its regulations would no longer be relevant, as courts would now defer to the new regulatory interpretation. Pl.'s Opp'n at 12-13, n. 11; Tr. Hr'g 10/15/02 at 45, 71.

Defendant's contention that plaintiffs' argument is "fanciful" misses the point. Def.'s Reply at 5-6. Plaintiffs are not alleging that, upon issuance of the requested relief by this Court, their remedy would then lie in subsequent actions against educational institutions based on this Court's order, notwithstanding the existence of controlling or persuasive authority upholding DoE's current interpretation of Title IX and its regulations. *See id.* at 6. Rather, plaintiffs contend that an award of the requested relief would, by striking down the 1979 Policy Interpretation's Three Part Test and the 1996 Clarification, remove any motivation for

educational institutions to engage in the conduct alleged to cause them harm. Pl.'s Opp'n at 13; Tr. Hr'g 10/15/03 at 110. In the absence of any regulatory motivation for cutting or capping men's teams, expanding women's programs without expanding men's programs, or fully accommodating women's, but not men's, athletic interests in order to comply with one of the three prongs of the Three Part Test, plaintiffs submit that educational institutions would voluntarily cede to the then strengthened arguments of groups such as plaintiffs to increase or maintain men's athletic opportunities. *Id.*

Notwithstanding this important point, plaintiffs have not alleged any facts which would allow them to meet even the minimal burden of pleading causation and redressability under the motion to dismiss standard. With respect to causation, plaintiffs have not alleged, beyond conclusory assertions, that the Three Part Test represents a "substantial factor" in third party decision-making. *See* Pl.'s Opp'n at 12-13; Def.'s Mot. at 17; Def.'s Reply at 3-4; First Am. Compl. ¶¶ 50-51; *see also Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C.Cir.1990) ("For standing purposes, petitioners need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test. This is true even where the injury hinges on the reactions of third parties ... to the agency's conduct. In such cases, the alleged injury must be traced back through the actions of the intermediary parties to the challenged government decision."); *Bldg. & Constr. Trades Dept., AFL-CIO v. Allbaugh*, 172 F.Supp.2d 138, 150 (D.D.C.2001), *rev'd* on other grounds, 295 F.3d 28 ("[I]t is clear that when plaintiffs can prove that the federal government's conditional funding offer is the *actual* and *only* reason for a recipient's decision, causation has been established."). In fact, plaintiffs appear to concede the point by acknowledging that even if the Court granted the relief requested, plaintiffs and their opponents would still be

arguing their respective positions to educational institutions, including Bucknell, Marquette, and Yale, which would, in turn, continue to make discretionary determinations with respect to capping, cutting and adding teams based on a number of factors, including those set forth in the 1975 Regulations, as well as factors separate and apart from Title IX and its attendant regulations. *See* Pl.'s Opp'n at 13. With respect to redressability, plaintiffs also contend that they have alleged facts sufficient to meet the "likelihood" of redress necessary to confer standing. Pl.'s Opp'n at 12. For instance, they point to their allegations, based on a press release issued by Bucknell University, that the institution cut its men's wrestling team solely to meet the first prong of the Three Part Test, and submit that, if the 1979 Policy Interpretation and the 1996 Clarification are stricken, because private funding is available to support the Bucknell wrestling team, "presumably" Bucknell University would reinstate a varsity men's wrestling team. Tr. Hr'g 10/15/02 at 118-19. Plaintiffs also allege that Marquette's athletic director has stated that Marquette "might" bring back its wrestling program "if the legal requirements changed." First Am. Compl. ¶ 51. No allegations whatsoever are made regarding the effect the requested relief would have on Yale University's decision to cut its men's wrestling program. Responding to the Court's query regarding the speculative nature of such predictions, plaintiffs' counsel simply stated, without more, "we have every reason to believe" that, at a minimum, Marquette University would reinstate its men's wrestling team on a privately funded basis if at least the first prong of the Three Part Test were struck down. Tr. Hr'g 10/15/02 at 119.

Plaintiffs also argue that defendant greatly exaggerates the degree of "likelihood" of redress required to establish Article III standing. Pl.'s Opp'n at 12. However, as pointed out by defendant, the cases relied upon by plaintiffs are inapposite. *See* Def.'s Reply at 5, n. 2. For instance, plaintiffs

cite to this Court's opinion in *Allbaugh* for the proposition that "when a challenged agency action authorizes allegedly illegal activity that will almost surely harm a person, that person has standing to make a claim." *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh,* 172 F.Supp.2d at 147. However, in *Allbaugh,* the challenged agency action, an Executive Order strictly prohibiting certain conduct on the part of executive agencies awarding construction contracts, directly led the agencies in question to rescind labor agreements previously negotiated with plaintiffs, as well as to reject future agreements of the type prohibited. *Id.* at 143-45. Prior to making the statement relied upon by plaintiffs, this Court noted that the plaintiffs in *Allbaugh* had lost the benefit of a particular agreement previously negotiated with a government agency subject to the Executive Order, were precluded from attempting to negotiate such agreements with government agencies in the future, or both. *Id.* at 147-48. *Allbaugh* is therefore readily distinguished from this case. *Allbaugh* involved a regulation which directly prohibited an agency from taking a particular course of action, which, in turn, directly affected the plaintiffs in particularized ways. *See id.* at 155 ("the causal chain ... is clear: [the Executive Order] prohibits federal agencies from including PLAs in the bid specifications or other contract documents for federally owned projects."). Moreover, at least one of the contracting agencies had specifically represented that it would enter into the type of agreement prohibited by the Executive Order if the Order were struck down. *Id.* at 150-51. Once preliminary injunctive relief was granted, it proceeded to do precisely that. *Id.* at 151. Conversely, under Title IX as enforced by DoE, educational institutions select from a range of options when choosing how to comply with the statute and its regulations while meeting their academic and athletic goals with limited resources. *See, e.g. Cohen II,* 101 F.3d at 185 (institutions may achieve compliance with Title IX by eliminating athletic programs altogether, elevating or

creating the number of women's athletic opportunities, demoting or eliminating the number of men's opportunities, or a combination of remedies; institutional priorities will determine the path to compliance elected by an institution); *see Allbaugh*, 172 F.Supp.2d at 155 ("[The Executive Order] does not present federal agencies with a choice; rather it directly prohibits federal agencies from including PLAs in their bid specifications.").

Flexibility, as well as First Amendment considerations embodied within the notion of academic freedom, are central to the Title IX statutory and regulatory framework. *See, e.g. Cohen II*, 101 F.3d at 187; *Kelley v. Bd. of Tr.*, 35 F.3d at 271; *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d at 171 ("the provisions of title IX grant flexibility to the recipient of federal funds to organize its athletic program as it wishes, so long as the goal of equal athletic opportunity is met."). Educational institutions selecting athletic offerings exercise discretion within a complex regulatory scheme which requires consideration of a multitude of factors beyond the effective accommodation of the interests and abilities of members of both sexes, the regulatory factor under which the Three Part Test is applied. *See* 34 C.F.R. § 106.41(c); *see also Cohen II*, 101 F.3d at 171 ("In short, the substantial proportionality test is but one aspect of the inquiry into whether an institution's athletics program complies with Title IX."). These include, among others, distribution of facilities, coaching, and scholarship resources among teams, male and female, scheduling of practice time and games, and the competitiveness of various teams. *See* 34 C.F.R. § 106.41(c); *see also* 34 C.F.R. § 106.37(c)(institutions "must provide reasonable opportunities for such award [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics."). Furthermore, factors external to the regulatory scheme come into play in athletic program decision-making, including the desire to achieve a particular

competitive level, availability of athletes with high school competition experience, and spectator interest.[17] *See, e.g., Kelley v. Bd. of Tr.*, 35 F.3d at 269 (men's swimming selected for termination because, "among other things, the program was historically weak, swimming is not a widely offered athletic activity in high schools, and it does not have a large spectator following."). While plaintiffs are not required to eliminate every other potential cause of their injury, it cannot be held, as it was in *Allbaugh*, that the Three Part Test and 1996 Clarification, which address a single aspect of this complex algebra, so controls the conduct of third parties as to confer standing on plaintiffs. *See Allbaugh*, 172 F.Supp.2d at 149 ("While indirect causation is possible, the Supreme Court has yet to define the precise parameters for determining when indirect causation is sufficient for standing purposes. Each court faced with such a question

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[17] Plaintiffs ask this Court to take financial considerations out of the chain of causation because, at least with respect to Bucknell, Marquette, and Yale, private funding to sustain the men's wrestling program is available or has been offered. See Tr. Hr'g 10/15/02 at 118-19. However, it is noteworthy that, in a recent decision, the Eighth Circuit held that

> a public university cannot avoid its legal obligations by substituting funds from private sources for funds from tax revenues. Once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement....

Chalenor v. Univ. of N.D., 291 F.3d at 1048. Moreover, universities have "no obligation to accept the donation." Id. Therefore, plaintiffs' assertions that "but for Title IX," Bucknell, Marquette, and Yale would not have cut their men's wrestling teams because funding was available to sustain them are by no means water-tight. Nevertheless, the Court has, as required by the governing case law, made all favorable inferences in favor of the plaintiffs, and has not relied on funding considerations in its analysis of causation and redressability.

must determine how much 'coercion' is sufficient to hold that the government's action caused a third party's action to injure plaintiff.").

Similarly, while plaintiffs need not prove that the requested relief is certain to alleviate the harm alleged, particularly in the context of a complex regulatory scheme governing the conduct of third parties, they must produce at least some evidence that the immediate result of striking down the contested regulations would be a reduction in the harm alleged. *See Cmty. Nutrition Inst. v. Block,* 698 F.2d 1239, 1248-49 (C.A.D.C.1983) *rev'd* on other grounds, 467 U.S. 340, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). It is particularly relevant in this regard that there have been no representations on the part of any of the specific educational institutions whose conduct is the subject of plaintiffs' allegations that the teams cut would be reinstated should this Court grant plaintiffs the relief they seek. *Compare Competitive Enter. Inst. v. Nat'l Hwy. Traffic Safety Admin.,* 901 F.2d at 114- 18 (major auto manufacturers stated on the record that, in the absence of challenged standards, they would make efforts to regain market share by producing larger vehicles, "[t]he administrative record [was] replete with evidence that manufacturers face consumer demand for larger vehicles," agency's own fact finding demonstrated causal effect between regulation of fuel efficiency and availability of larger and heavier vehicles, and past experience demonstrated that manufacturers were likely to respond to lower standards by continuing or expanding production of larger, heavier vehicles); *Cmty. Nutrition Inst. v. Block,* 698 F.2d at 1248 (plaintiffs cited to U.S. Dept. of Agriculture Impact Statement predicting that elimination of regulatory requirement would result in savings to consumer plaintiffs); *Bldg & Constr. Trades Dep't, AFL-CIO v. Allbaugh,* 172 F.Supp.2d at 150-51 (at least one of contracting agencies had represented that it would take action eliminating alleged harm if challenged regulation was struck down, and

did so upon grant of preliminary injunction). Plaintiffs' failure to offer more specific and concrete allegations suggesting a "substantial likelihood" that invalidation of the challenged policy interpretations would change third party educational institutions' conduct in such a way as to alleviate their alleged harm renders their reliance on *Allbaugh* misplaced.

Plaintiffs also rely on the D.C. Circuit's opinion in *Northeast Energy Associates v. FERC* to support their assertion of standing. *Northeast Energy Associates v. FERC*, 158 F.3d 150, 151, 153-54 (D.C.Cir.1998). There, the court found that rate payers had standing to challenge agency action allowing a regulated third party to charge plaintiffs a prescribed rate for the transport of natural gas during a specific period of time. *Id.* However, under the relevant statute, the agency, the Federal Energy Regulatory Commission ("FERC"), must approve the rates charged by natural gas pipeline operators. *Id.* at 151. Therefore, as was the case in *Allbaugh*, the agency exercised complete control over the relevant third party conduct.

Moreover, the *FERC* court noted that, on the facts before it, plaintiffs' relief did not depend entirely on the conduct of third parties. *Id.* at 153. Because the agency effectively controlled the maximum rate natural gas providers could charge plaintiffs, it could have taken direct action which would have provided plaintiffs the relief sought, simply by requiring the third party to charge plaintiffs lower rates during the relevant time period. *Id.* Therefore, the Circuit found that remand to the agency for new rulemaking could in fact lead directly to redress of plaintiffs' harm without relying on a third party's discretionary decision-making, because the agency might choose, on remand, to reverse its decision to suspend the operation of lower rates for five months. *Id.* at 154.

Here, there is no direct action DoE could take in new rulemaking which would force educational institutions to redress plaintiffs' alleged injuries. Even if DoE were to adopt an interpretation of the statute and the 1975 Regulations reflecting all of plaintiffs' desires, and completely withdraw federal funds pursuant to 20 U.S.C. § 1682 from educational institutions engaging in cutting and "capping" men's teams, the institutions in question could still conceivably persist in the conduct complained of if motivated by other considerations. *See Freedom Republicans,* 13 F.3d at 419; *see also* NWLC Brief at 15 (some men's teams could still be cut in order to accommodate other men's teams rather than to accommodate women's teams). While withdrawal of all federal funding to an institution is a powerful enforcement tool, it does allow the funded entity to elect to proceed with discriminatory conduct in the absence of federal funding without punitive repercussions. As such, it is an enforcement mechanism substantially different from the regulations implicated in the cases relied upon by plaintiffs, which directly permit and prohibit conduct, and subject a regulated third party to civil or criminal enforcement actions for noncompliance.

The case cited by plaintiffs which comes closest to supporting a finding that plaintiffs have alleged facts sufficient to survive a motion to dismiss for failure to meet the redressability prong of the standing test falls far short of doing so. *Motor & Eq't Man. Ass'n v. Nichols* involved a challenge brought by manufacturers of car parts to an EPA regulation permitting auto manufacturers to comply with federal auto-emissions standards by instead complying with California emissions standards. *Motor & Eq't Man. Ass'n v. Nichols,* 142 F.3d 449, 452 (D.C.Cir.1998). Plaintiffs in that case contended that manufacturers' statutorily authorized election to comply with the California standards as opposed to the federal standards decreased the market for their parts because compliance with California standards made their

parts more difficult to install. *Id.* Defendants challenged plaintiffs' standing on the grounds that auto manufacturers made independent decisions with respect to which standard to comply with, and therefore repeal of the challenged rule would not necessarily affect the decisions of these "third parties not before the Court." *Id.* at 457.

However, the Circuit found in *Nichols* that the challenged rule had indisputably resulted in a virtually unanimous decision by auto manufacturers to comply with California standards rather than federal standards. *Id.* As a result, the "tremendous incentive" created by the challenged rule for third parties to engage in conduct harmful to the plaintiffs left "no doubt" in the Circuit's mind that "the unfettered choices made by independent actors [had] been ... made in such a manner as to produce causation." *Id.* (citing *Lujan,* 504 U.S. 555, 112 S.Ct. 2130). Accordingly, a court order vacating the challenged rule and ordering the agency to undertake a new rulemaking could remedy plaintiffs' alleged injuries, and a declaration by the court that the challenged agency regulation was unlawful under the Clean Air Act would render redress of plaintiff's injury more likely at the agency level. *Id.* If the agency engaged in rulemaking consistent with the Circuit's opinion, manufacturers would be barred from complying with the California standard, and would have no choice but to comply with the federal standard.

Conversely, plaintiffs in this case have alleged no such virtually unanimous decision on the part of educational institutions to comply with the challenged Title IX enforcement scheme by cutting or capping men's teams or otherwise disadvantaging male athletes and coaches. Indeed, *amici* NWLC *et al* cite to numerous instances in which educational institutions have been found to be in compliance with the Three Part Test without cutting or capping men's teams in order to comply with the first prong of the Three Part Test. *See* NWLC Brief at 11 ("the actual

operation of the three-part test has demonstrated that the great majority of schools have expanded opportunities for men as well as women in complying with its requirements") (citing *NCAA 1982-2001 Sports Sponsorship and Participation Statistics Report* (2002)). In fact, *amici* NWLC point to a recent GAO study which indicates that the number of men's teams has increased overall since 1982, including at schools which added women's teams. *Id.* at 12 (citing *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams* (2001)). Moreover, funded educational institutions have cut and capped men's teams while increasing women's athletic opportunities during periods when the Three Part Test was not enforced. *See* NWLC Brief at 12 ("[i]n [a] four year period when the three-part test was not in effect, colleges and universities cut wrestling teams at a rate almost three times as high as the rate of decline during the 12 years after Title IX's application to intercollegiate programs was firmly reestablished ...") (citing *NCAA 1982-2001 Sports Sponsorship and Participation Statistics Report* (2002)); *see also Competitive Enter. Inst. v. Nat'l Hwy. Traffic Safety Admin.*, 901 F.2d at 117 (relying in part on past history of third party conduct in response to regulatory changes). These historical patterns lend further support to the proposition that multiple considerations in addition to, and beyond compliance with, the challenged interpretation of Title IX, inform the decisions of educational institutions, including Bucknell and Marquette, to cut men's wrestling teams.[18] Conditions under which the Three Part Test plays

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[18] See Bucknell News Release, May 2, 2001, stating that decision to cut men's wrestling team was made not only to comply with Title IX, but also in an effort to "retain excellence in our existing sports programs, and be fiscally responsible." See also Marquette News Release, June 17, 2001,

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no role whatsoever in causing the alleged harm to plaintiffs, and in which striking down the challenged interpretations would have no effect, are therefore entirely plausible.

Plaintiffs respond, and *amici* NWLC *et al.* concede, that men's athletic opportunities have not increased at the same rate as women's over the time period during which the Three Part Test has been enforced. *See* NWLC Brief at 11 (rate of increase in women's athletic opportunities has been higher). Plaintiffs further contend that the disproportionate increase in women's opportunities reflects intentional discrimination against men authorized by the second and third prongs of the Three Part Test. However, as NWLC correctly points out, any disproportionate increase in women's athletic opportunities could just as easily be the result of institutions' non-discriminatory efforts to accommodate women's growing interest in athletics. *See* NWLC Brief at 8. At most, plaintiffs allege that at "some" institutions men's interest is greater than women's, but nevertheless women's interests are being more fully accommodated than men's as a result of efforts to comply with the second and third prongs of the Three Part Test. Pl.'s Opp'n at 3 n. 4, 9; Tr. Hr'g 10/15/02 at 119 ("there are some schools in the United States, and this is what we said in the

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citing "the financial and competitive environment," as well as compliance with Title IX, as justifications for cutting men's wrestling team.

Additionally, it has been suggested that men's sports such as wrestling are just as likely to be cut because of disproportionate consumption of resources by other men's sports, such as football and basketball. See NWLC Brief at 15. Under such circumstances, plaintiffs' alleged injuries could be addressed without offending the Three Part Test by reapportioning resources within men's athletic departments. Id.

complaint, where men are more interested than women or we assume that's the case ... at least at those schools there's an argument that men are more interested than women ... men are put essentially on an unequal footing.") Such generalized and conclusory allegations, accompanied by vague references to overall decreases in men's athletic opportunities and increases in women's opportunities, are insufficient to establish either causation or redressability with respect to the second and third prongs.

As a result, plaintiffs' First Amended Complaint falls far short of alleging a uniform discriminatory response arising from educational institutions' efforts to comply with at least one of the three prongs of the Three Part Test. While an educational institution's exercise of discretion may indeed be limited to selection among three options for demonstrating equal athletic opportunity, plaintiffs have not established causation or redressability under the case law cited with respect to any one of the three prongs of the Three Part Test.

Moreover, as pointed out by defendant, educational institutions, unlike automobile manufacturers, do not require authorization from a government agency to engage in the conduct giving rise to plaintiffs' action. Def.'s Reply at 5 n. 2. Therefore, this case is distinguishable from those in which vacating government action would render a third party's conduct illegal, thereby effectively preventing third parties from engaging in the conduct alleged to cause harm. *See* Def.'s Mot. at 16. Even assuming *arguendo* that all three prongs of the Three Part Test are a substantial cause, for standing purposes, of plaintiffs' injuries, and that the relief requested by plaintiffs were to be granted in its entirety,

under the Title IX statutory and regulatory framework, institutions could elect to forgo federal funding and still engage in intentional discrimination against men's teams based on considerations other than the Three Part Test.[19] *See* Tr. Hr'g 10/15/02 at 48 (plaintiffs' counsel concedes that, even if plaintiffs were granted all of the relief they seek, they would be limited to seeking termination of funding to institutions which persist in conduct they complain of). Accordingly, plaintiffs' reliance on cases in which a Court Order would have the effect of rendering the challenged conduct illegal are misplaced.[20]

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[19] This Court has previously rejected a bright line rule providing that a third party's decision regarding whether or not to comply with a federal pronouncement is "necessarily a voluntary and independent action of a third party because there is no sanction beyond the threatened loss of funding." Allbaugh, 172 F.Supp.2d at 151. In so doing, it noted that conditional funding can "cause" a third party recipient's decisions for standing purposes where it has the effect of coercing or determining the third party's conduct. See id. at 152. The Allbaugh opinion ultimately held that no speculation as to causation is required where "plaintiffs can prove to the requisite standard of proof that [a third party's] decision was actually caused by the federal government's threat to cease funding, and only by that threat." Id. at 150. However, as discussed above, considerations beyond compliance with Title IX and continued receipt of federal funding motivate the decisions of funded educational institutions regarding their athletic programs. As a result, plaintiffs have failed to meet the standard for establishing causation based on conditional funding set forth in Allbaugh. See also Freedom Republicans, 13 F.3d at 419 ("we would be venturing into pure speculation were we to attempt to foretell [third party] response to termination of its present funding.").

[20] Equally problematic is plaintiffs' subsequent reliance on the D.C. Circuit's holding in Animal Legal Def. Fund v. Glickman as supporting a finding of redressability. See Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426 (D.C.Cir.1998) (en banc); Tr. Hr'g 10/15/02 at 114; Pl.'s Reply in Supp. of Mot. for Leave to File Second Am. Compl. at 2. As in Motor &

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Plaintiffs' citation to this Circuit's decision in *Tozzi* is equally unavailing. Plaintiffs have not met their burden of alleging facts sufficient to establish that "agency action is at least a substantial factor motivating the third parties' actions." Pl.'s Opp'n at 11, citing *Tozzi v. U.S. Dep't of Health & Human Serv*, 271 F.3d 301, 308 (D.C.Cir.2001). In *Tozzi*, the agency action challenged was the issuance of a report intended to serve as the federal government's "authoritative state of knowledge regarding the carcinogenicity of various chemicals," and as a resource for federal, state, and local regulatory authorities. *Id.* at 309. The record established that it was an extremely influential document with respect to which substances the federal government considered appropriately labeled with the "inherently pejorative and damaging term... 'carcinogen.' " *Id.* at 309. Plaintiffs were manufacturers of products known to release the substance

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Eq't Man. Ass'n v. Nichols, the challenged agency action in Animal Legal Def. Fund directly prohibited or permitted particular conduct on the part of the third party. The consequences of non-compliance with agency regulations went beyond funding cuts. Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d at 439 ("If the USDA had found the Game Farm out of compliance with current regulations, or if the governing regulations had themselves been more stringent, the Game Farm's owners would have been forced (in order to remain in accord with the law) to either alter their practices or go out of business and transfer their animals to exhibitors willing to operate legally") It was in that context that the Circuit held a plaintiff's injuries to be redressable where challenged agency action authorizes otherwise illegal conduct. Id. at 440- 41. In this case, even if plaintiffs' contention that the 1979 Policy Interpretation and 1996 Clarification authorize conduct that is otherwise "illegal" under Title IX is accepted as true, third parties could still lawfully elect to engage in such conduct, albeit without the benefit of federal funding.

the report characterized as "a known human carcinogen." *Tozzi v. U.S. Dept. Of Health and Human Serv.*, 271 F.3d at 307. Moreover, 95 percent of the company's sales depended on the continued use of their product by "the medical establishment." *Id.* As a result, the D.C. Circuit found that it was "not too speculative to conclude that the Report will injure [plaintiffs] economically, even with the presence of other causal factors." *Id.* at 309. In light of the absence of any other authoritative federal government pronouncement describing the substance in question as a "known carcinogen," the Circuit also found that plaintiffs' alleged injury could be redressed by a court order declaring the report's findings to be without sufficient scientific basis. *Id.* at 309-10.

The 1979 Policy Interpretation and 1996 Clarification are concededly authoritative statements by a federal government agency regarding the means by which educational institutions may comply with Title IX. And, the facts at issue in both *Tozzi* and this case differ substantially from the circumstances before the courts in *Allbaugh, FERC,* and *Motor & Eq't Man. Ass'n,* in which the third parties whose conduct was alleged to be the cause of plaintiffs' harm were subject to the direct control of the agency whose actions were challenged.

However, the similarities between this case and *Tozzi* go no further. In *Tozzi,* the responses of state and local regulatory agencies, as well as private purchasers, to the challenged agency action were both entirely predictable and direct. *See Tozzi v. U.S. Dept. Of Health and Human Serv.*, 271 F.3d at 307 ("When the government attaches an inherently pejorative and damaging term such as 'carcinogen' to a product, the probability of economic harm increases exponentially."); *see also Block v. Meese,* 793 F.2d 1303, 1309 (D.C.Cir.1986) (public's irrational reaction to government agency's branding of films as "propaganda" did not preclude finding that alleged harm was "fairly traceable" to

government conduct). The influence of other causal factors paled in comparison to the likely effects of an authoritative governmental declaration that a product intended for a medical market released a "known human carcinogen." The relationship between the existence of the challenged regulatory interpretation and the injuries alleged by plaintiffs here is far more attenuated. Compliance with other aspects of the 1975 Regulations, financial considerations, staffing, availability of facilities, spectator interest, and competitiveness are but a few of the equally compelling considerations factoring into decisions made by educational institutions regarding their athletic programs.

On the facts alleged in the First Amended Complaint, the Three Part Test cannot be singled out as a "substantial factor" motivating the decisions of educational institutions, with the possible exception of Bucknell University's decision to cut its men's wrestling team.[21] Plaintiffs argue that an allegation that any school actually elected to cut or cap a men's team in an effort to comply with the first part of the Three Part Test is sufficient for purposes of causation, thereby rendering plaintiffs' allegations with respect to Bucknell sufficient to establish standing in this case. However, unlike the plaintiff in *Tozzi*, even with respect to Bucknell, plaintiffs cannot point, in support of their claim of

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[21] First Am. Compl. 50-52. The First Amended Complaint alleges with respect to Marquette University's decision only that it was made in an effort to comply with DoE's "Title IX policies." First Am. Compl. 51. Similarly, plaintiffs allege only that Yale University demoted its varsity wrestling team to "club status" and refused to accept a private endowment to sustain the team "because of Title IX." Id. 52.

redressability, to the absence of other causal factors of equal or greater weight in third party decision-making processes.[22]

Nor have plaintiffs alleged, with respect to redressability, that Bucknell has any intention of restoring its men's wrestling team should the Three Part Test be struck down, thereby removing this case from the reach of the *Allbaugh* and *Competitive Enter. Institute* holdings. As for Marquette University's men's wrestling team, a statement by Marquette's athletic director indicating "that Marquette might bring back its wrestling program if the legal requirements change" is insufficient to support a finding that redressability has been established. *See* First Am. Compl. ¶¶ 50, 51. To the contrary, it seems to confirm that educational institutions engage in multi-factor analysis with respect to athletic offerings, in which compliance with the Three Part Test is but one consideration among many, rather than responding predictably to a direct regulatory prohibition or permission. While a party "need not show to a certainty that a favorable decision will redress his injury," plaintiffs have not established, on the allegations of their complaint, even a "mere likelihood" that repeal of the Three Part Test will result in reinstatement of men's varsity wrestling at either Bucknell or Marquette. *See Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 705 (D.C.Cir.1988).

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[22] As noted above, the Bucknell press release on which plaintiffs rely cites to considerations beyond compliance with the Three Part Test as pertinent to Bucknell's decision to cut the men's wrestling program. See Bucknell News Release, May 2, 2001 (stating that decision to cut men's wrestling team was made not only to comply with Title IX, but also in an effort to "retain excellence in our existing sports programs, and be fiscally responsible.")

Nor does plaintiffs' allegation that "one third of institutions acknowledged cutting teams to comply with gender equity goals or requirements" establish that an Order of this Court striking down the Three Part Test and declaring "gender-conscious cutting and capping" unlawful would be "substantially likely" to lead these same educational institutions to make different decisions. First Am. Compl. ¶ 48. It goes without saying that plaintiffs' allegations "on information and belief" that Yale refused to accept a private endowment to support its varsity wrestling team "because of Title IX" is insufficient to establish causation or redressability for standing purposes.

Finally, plaintiffs contend that this Circuit found in *Women's Equity Action League v. Cavazos* that "identically situated plaintiffs" had standing to bring an action against DoE's predecessor, HEW, to redress injuries under Title IX. *See Women's Equity Action League v. Cavazos,* 879 F.2d 880, 884-88 (D.C.Cir.1989) [hereinafter "WEAL I"]. It bears emphasizing that plaintiffs in this case are not "identically situated" to those in *WEAL I,* notwithstanding their claim that they too seek enforcement of Title IX's proscription against intentional discrimination based on sex through repeal of an agency interpretation of the statute which they contend authorizes, and even requires, intentional discrimination against men. *See WEAL I,* 879 F.2d at 884 (women's organizations charged that the federal government disbursed federal funds to institutions engaged in discrimination based on sex, thereby assisting in the perpetuation of discrimination against plaintiffs). First and foremost, plaintiffs here are not, as were plaintiffs in *WEAL I,* challenging DoE's decision to provide federal funding to the educational institutions they allege are engaging in discriminatory conduct. *See Women's Equity Action League v. Cavazos,* 906 F.2d 742, 747 (D.C.Cir.1990) ("WEAL II") ("Authorization to sue the federal government in a situation-specific suit for improperly funding a particular entity or

enterprise, however, is not equivalent to a permit to demand across-the-board judicial supervision of continuing federal agency enforcement.").

Secondly, the *WEAL I* opinion noted that "[p]laintiffs in this action, beyond question, are the intended beneficiaries of the statute under which they sue." *Id.* at 886. Conversely, several courts have noted that Title IX "focuses on opportunities for the underrepresented gender, and does not bestow rights on the historically overrepresented gender." *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d at 615; *see also Cohen II*, 101 F.3d at 175. As one court observed, although Title IX and its regulations apply equally to men and women, "it would require blinders to ignore that the motivation for the promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges." *Cohen II*, 101 F.3d at 175 (quoting *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d at 175). "It is women and not men who have historically and continue to be underrepresented in sports ... at universities nationwide." *Cohen II*, 101 F.3d at 175.

Moreover, the D.C. Circuit has more recently limited the *WEAL I* holding to its facts.[23] *Freedom Republicans v. FEC*, 13 F.3d at 417-18. In so doing, the Circuit noted that the *WEAL I* panel's rationale for finding redressability had been

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[23] It is also worth noting that the D.C. Circuit subsequently held in WEAL II that, in light of intervening authority, the plaintiffs in that case could not sustain a cause of action against a federal funding agency while bypassing funding recipients. See WEAL II, 906 F.2d at 747-750. However, the Circuit came to this conclusion on statutory, rather than standing, grounds.

"undercut substantially" by the U.S. Supreme Court decision in *Lujan*, which held that "[w]hen plaintiffs' asserted injury stems from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, the 'fairly traceable' and redressability prongs require more exacting scrutiny." *Freedom Republicans v. FEC*, 13 F.3d at 416, 417 (citing *Lujan*, 504 U.S. 555, 112 S.Ct. 2130). The *Freedom Republicans* opinion also emphasized the "formidable evidence" in support of redressability adduced in *WEAL I*. *Id.* at 418. In applying the level of scrutiny to plaintiffs' assertion of standing required by current U.S. Supreme Court and D.C. Circuit precedent, this Court cannot but conclude that plaintiffs' assertion of standing based on that of their student athlete and coach members fails on causation and redressability grounds, for the reasons outlined above.

The allegations plaintiffs seek to add through the proposed Second Amended Complaint do not alter this result. Plaintiff NWCA can no more establish standing as an organization than its members can. In fact, plaintiffs' allegation that NWCA is directly harmed by the Three Part Test because institutional compliance results in decreased membership is one more step removed from agency action in the chain of causation than the injuries alleged by its student athlete and coach members. *See* Second Am. Compl. ¶ 4, Tocci Decl. ¶¶ 5,6. Plaintiffs' members represent additional third parties whose independent and discretionary decisions to maintain or cancel their membership when men's wrestling teams are cut or capped are beyond the control of this Court. *See Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d at 1387. NWCA's allegation that "[a]fter a high school, college, or university cuts its wrestling team, it generally does not renew its membership in future years" is certainly not sufficient to persuade this Court that the choices of these third parties "have been or will be made in such a manner as to produce causation and permit redressability of injury." *See Lujan*, 504

U.S. at 562, 112 S.Ct. 2130; *see also Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d at 1387 ("Significantly, the amended complaint contains no allegation that the NCAA has lost a single member ... on account of the HEW regulations."). Accordingly, if causation and redressability cannot be established for plaintiff NWCA's student athlete and coach members, there is no basis for a finding that it has been established with respect to NWCA as an organization.

Nor does plaintiffs' allegation that NWCA includes among its members "federally funded colleges, universities, high schools, and associations of high schools that are directly affected by the Title IX rules challenged in this action" correct defects in plaintiffs' assertion of standing. To the extent that such institutions claim that they serve as unwitting tools of discrimination based on sex, they, as well as the coaches that plaintiff associations count among their members, appear to be limited to asserting third party standing on behalf of student athletes. *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d at 350, *Fraternal Order of Police v. United States*, 152 F.3d at 1002. In light of this Court's finding that student-athletes' assertion of standing fails on causation and redressability grounds, this claim on behalf of plaintiffs' coach and institutional members must also fail.

To the extent that plaintiffs assert some other direct injury to their members who are federally funded educational institutions, they have failed to do so with any specificity whatsoever. Plaintiffs make no specific allegations whatsoever regarding the effects of the 1979 Policy Interpretation and 1996 Clarification on the only two institutional members named in the proposed Second Amended Complaint and its accompanying declarations, Muhlenberg College and Northwestern University, or for any other institutional member for that matter. Plaintiffs also fail to allege any injury to Northwestern University as an institution arising from its negotiation of a settlement agreement with DoE requiring compliance with the first

prong of the Three Part Test beyond the "forced instrument of discrimination" injury discussed above. And, most notably, plaintiffs do not allege that Bucknell University, Marquette University, or Yale University, the institutions with respect to which they have made their most specific allegations regarding the impacts of the challenged regulatory interpretations, are members of any plaintiff association.

Plaintiffs contend that, at the motion to dismiss phase, they need not plead facts with the same specificity as at the summary judgment phase. Pl.'s Opp'n at 6, citing *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 311-312 (D.C.Cir.1987). Specifically, plaintiffs argue, relying on this Circuit's decision in *Nat'l Wildlife Fed'n v. Burford*, that they need not, at the motion to dismiss stage, identify a specific member who is affected by agency action. It is true that the Circuit held in *Burford* that, where a plaintiff "asserts particularized, discrete injuries to its members as persons who regularly use areas affected by the Program for specific activities and pastimes," there is no authority requiring that it allege precisely which members use which specific areas of land subject to challenged agency action. *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d at 313. However, this holding does not go so far as to authorize the type of allegations, or lack thereof, plaintiffs seek to rely upon here as a basis for standing. Moreover, plaintiffs fail to mention that in *Burford*, the plaintiffs had appended to their Complaint a list of 778 specific actions taken by the agency with respect to particular pieces of land, thereby providing sufficient specificity regarding the injuries alleged and the agency's role in causing them.

No such degree of specificity is present here. Plaintiffs ask this Court to accept their allegations that DoE has initiated investigations and enforcement actions, and negotiated settlement agreements relying on the 1979 Policy Interpretation and the 1996 Clarification, some of which

have involved plaintiffs' institutional members, as sufficient to establish the three elements of Article III standing. Second Am. Compl. ¶¶ 58-60. Even under the liberal pleading requirements at the motion to dismiss stage, such a reading of controlling precedent is strained.

Nevertheless, as discussed below, even if the Court assumes Muhlenberg and Northwestern's standing to challenge the 1979 Policy Interpretation and the 1996 Clarification based on their status as regulated entities, plaintiffs cannot meet the third prong of the associational standing test with respect to these members. *See Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d at 1388-1391 (finding that plaintiffs' college members had standing, as regulated parties, to challenge HEW's Title IX regulations relating to athletics).

2. Associational Standing

Before plaintiffs' associational standing can be premised on that of its institutional members, the Court must consider the remaining two prongs of the associational standing test. While it is undisputed that the interests plaintiffs seek to protect are germane to their organizational purpose,[24] it is also clear that the relief requested requires the participation of individual NWCA's institutional members. *See* Fed.R.Civ.P. 19;[25] [FN25] *Fund Democracy, LLC v. SEC*, 278

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[24] See Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin., 901 F.2d 107, 111 (D.C.Cir.1990) ("Germaneness is satisfied by a "mere pertinence" between litigation subject and an organization's purpose.").

[25] Rule 19(a) of the Federal Rules of Civil Procedure provides for the joinder, if feasible, of a party if, in the party's absence "complete relief cannot be accorded among those already parties," or the party "claims an interest relating to the subject of the action and is so situated that the

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F.3d at 25; *Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d at 1391-92.

For instance, insofar as plaintiffs challenge the validity of the settlement agreement entered into between its member Northwestern University and DoE as an application of the 1979 Policy Interpretation's Three Part Test and the 1996 Clarification, Northwestern is an indispensable party to such an action. *See* Fed.R.Civ.P. 19(b); *Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C.Cir.1983). "Numerous cases hold that 'an action seeking recision of a contract must be dismissed unless all parties to the contract, and others having a substantial interest in it, can be joined.' " *Naartex Consulting Corp. v. Watt*, 722 F.2d at 788. Because plaintiffs have alleged no basis for this Court to assert personal

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disposition of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect that interest ...." Fed.R.Civ.P. 19(a). If a party described in Rule 19(a) cannot be joined in the action, under Rule 19(b) the Court is required to determine "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Fed.R.Civ.P. 19(b). The Court must consider the following factors when making this determination:

(1) "to what extent a judgment rendered in the person's absence might be prejudicial to the person or to those already parties;"

(2) "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;"

(3) "whether a judgment rendered in the person's absence will be adequate;"

(4) "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

jurisdiction over Northwestern University, to the extent that plaintiffs enjoy standing based on a challenge to the manner in which the 1979 Policy Interpretation and 1996 Clarification were applied to Northwestern University so as to give rise to the settlement agreement, their claim must be dismissed for failure to join an indispensable party under Fed.R.Civ.P. 19(b).[26] This analysis applies with equal or greater force to plaintiffs' more generalized allegations of injury to its institutional members, including Muhlenberg College. *See* Tr. Hr'g 10/15/02.

Plaintiffs respond that they do not seek to challenge compliance agreements entered into between DoE and its member institutions. Pl.'s Reply to Def.'s Supp. Mem. At 8. Rather, plaintiffs now allege that they "seek to establish a continuing violation of Title IX and the APA through ... ongoing enforcement of *ultra vires* rules." *Id.* Nevertheless, because plaintiffs have failed to specify precisely how they believe enforcement of the 1979 Policy Interpretation and 1996 Clarification injures their educational institution members, as distinct from their individual members, or even suggest that the majority of their institutional members support their position with respect to DoE's promulgation and enforcement of these regulatory interpretations, the Court cannot but conclude that the presence of those

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[26] Plaintiffs urge that, because the question of whether NWCA's member schools would appear voluntarily in this action if the Court found them to be indispensable has not been addressed by the parties, the Court should deny the motion to dismiss and permit discovery. In view of the fact that plaintiffs have had ample opportunity to seek the voluntary participation of their member schools in this action, and have provided the Court with no reason to believe that discovery is necessary to enable them to secure such participation, plaintiffs' recommendation is without merit.

institutions in this action is required to both assert and protect their interests. *See* Fed.R.Civ.P. 19(b); *Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d at 1391 ("when an association does not have standing in its own right, and it is not clear on which side of the lawsuit the association's members would agree with, one or more of the members must openly declare their support of the association stance, and they must do so through those officials authorized to bring suit on their behalf.").

For the reasons set forth above, this Court holds that plaintiffs do not have standing under Article III of the U.S. Constitution to assert their claims under Counts I and II. It further holds that the additional allegations plaintiffs seek to make in the proposed Second Amended Complaint do not cure jurisdictional defects, and therefore are futile.[27]

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[27] It bears emphasis that this Court has afforded plaintiffs a generous presumption that they are acting in good faith in moving for leave to file a Second Amended Complaint seeking to amend allegations regarding their own membership at this late date. Defendant correctly points out that, when plaintiffs filed this suit in January of 2002, plaintiff NWCA was "not-for-profit corporation representing the interests of collegiate and scholastic wrestling coaches." Def.'s Opp'n to Pl.'s Mot. for Leave to File Second Am. Compl. at 1-2; Compl. 4. In May of the same year, plaintiffs essentially reiterated this understanding of NWCA's membership in their First Amended Complaint. Def.'s Opp'n to Pl.'s Mot. for Leave to File Second Am. Compl. at 1; First Am. Compl. 4. Immediately on the heels of oral argument on defendant's motion to dismiss, plaintiffs sought to amend their complaint yet again, this time to make substantial and material changes to their allegations regarding plaintiff NWCA's membership, which it now contends includes a much broader array of constituents, even though they did not know "with the requisite certainty" that these members were among NWCA's number a mere five months before. See Pl.'s Mem. in Support of Mot. for Leave to File Second Am. Compl. at 1. To say the least, plaintiffs' assertions strain credulity.

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Accordingly, it need proceed no further with respect to those claims.

This Court's finding that these particular plaintiffs do not have standing to assert the claims in Counts I and II neither places the challenged agency actions beyond judicial review nor denies plaintiffs a forum in which to seek relief. Regulated entities, including plaintiffs' educational institution members, are empowered to challenge DoE's regulations and interpretations thereof, provided they meet the "case or controversy" requirements of Article III and Fed.R.Civ.P. 19 is satisfied. *See, e.g., N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299; *Nat'l Collegiate Athletic Ass'n v. Califano,* 622 F.2d at 1388-1391; *Romeo Cmty. Schs. v. U.S. Dept. of H.E.W.,* 600 F.2d 581. Additionally, Title IX itself expressly provides for a cause of action by any institution denied funding under the statute, through which the institution could challenge the agency's authority to adopt the policy interpretations at issue here, or the manner in which they are applied to that particular institution. *See* 20 U.S.C. § 1683 ("In the case of an action ... terminating or refusing to grant or continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved ... may obtain judicial review of such action ...."). Accordingly, any of plaintiffs' member institutions who wish to challenge a specific enforcement

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Nevertheless, this Court, has, as required to by controlling authority, made all reasonable inferences in favor of plaintiffs in adjudicating defendant's motion to dismiss.

action by DoE against them are free to do so, either directly under Title IX or under the APA.

An implied right of action against funded educational institutions clearly exists for plaintiffs, as representatives of their individual members, to challenge a funded entity's conduct under the regulations. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560. Plaintiffs are free to argue in such an action that the agency's interpretation of the statute and its regulations, as embodied in the 1979 Policy Interpretation and 1996 Clarification, are not entitled to deference under the APA or *Chevron*, but rather should be struck down as unconstitutional or contrary to Title IX.

The Sixth Circuit's decision in *Miami Univ.* does not, as plaintiffs contend preclude such actions. Rather, it simply requires that plaintiffs directly challenge DoE regulations and policy interpretations followed by a funded entity when they challenge conduct by an educational institution taken in conformity with those agency pronouncements. *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d at 614; *see also Kelley v. Bd. of Tr.*, 35 F.3d at 272.

Nor does the U.S. Supreme Court's opinion in *Alexander v. Sandoval* preclude plaintiffs from challenging the agency interpretations they seek to vacate here. *See Alexander v. Sandoval* 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). Plaintiffs' arguments to the contrary are contradictory to say the least. While, on the one hand, plaintiffs ask this Court to vacate the agency's "disparate impact" "rules," in the next breath they claim that they are without means to challenge the agency's interpretations of the statute and regulations because *Sandoval* precludes them from bringing a "disparate impact" action to enforce Title IX. *See Alexander v. Sandoval*, 532 U.S. 275, 285, 121 S.Ct. 1511 (private right of action to enforce Title VI does not include a private right to enforce "disparate impact regulations."); Tr. Hr'g 10/15/02 at 37, 40,

74. Such circular and self-serving arguments cannot possibly form a solid basis for standing. This Court finds that, whatever the status of plaintiffs' potential ability to *enforce* the policies they challenge here, they are certainly free to *challenge* them by means of an action against a funded entity conducting itself in accordance with them, so long as they raise facial statutory and constitutional challenges to the 1979 Policy Interpretation and 1996 Clarification.

Accordingly, plaintiffs and their individual and institutional members are not without standing to challenge the agency conduct at issue in any forum. Rather, they simply have not made allegations sufficient to support their standing to assert the claims they wish to make under Counts I and II of the First Amended Complaint against this defendant.

COUNT III--DENIAL OF PETITION

The APA requires each agency to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). Judicial review of an agency's grant or denial of a petition made pursuant to § 553(e) is available, although the scope of review is "very narrow" and deferential, and the agency's decision must be sustained if it "violates no law, is blessed with an articulated justification that makes a rational connection between the facts and the choice made, and follows upon a 'hard look' by the agency at the relevant issues." *Natural Res. Def. Council, Inc. v. S.E.C.*, 606 F.2d 1031, 1039 (D.C.Cir.1979) (citation omitted); *see also Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C.Cir.1987); *WWHT v. FCC*, 656 F.2d 807, 816-18 (D.C.Cir.1981).

Plaintiffs contend that, by letter dated October 25, 1995, plaintiff NWCA submitted a 5 U.S.C. § 553(e) petition for amendment or repeal of the Three Part Test, on the grounds that "the test violates the rights of male athletes under Title IX and the Constitution," and on the basis of "changed

circumstances between the 1970s and the 1990s." First Am. Compl. ¶¶ 74, 75. Plaintiffs further allege that DoE expressly and summarily denied their petition in the final 1996 Clarification, and that such denial represented "final agency action that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law." *Id.* at ¶¶ 76, 77. Assuming plaintiffs' allegations to be true, as we must, an improper denial of a petition brought under 5 U.S.C. § 553(e) constitutes a concrete and particularized injury, directly caused by the agency to which the petition was addressed, and redressable by this Court through remand to the agency for proper consideration of the petition. Accordingly, plaintiffs have standing under Article III to pursue this claim.

COUNT IV--ABDICATION

In Count IV of their complaint, plaintiffs allege that DoE abdicated its responsibility to enforce Title IX's prohibition against discrimination based on sex by promoting and approving institutional conduct under the Three Part Test which discriminates against men. Pl.'s Opp'n at 17.

Plaintiffs' so-called "abdication claim," fails not for lack of standing, but for failure to state a claim. In *Washington Legal Foundation,* cited by plaintiffs in support of their claim, the D.C. Circuit held that, on the facts before it, which are akin to those before this Court, there was no basis for finding that a direct action against the agency under an "abdication theory" was available under the APA. *Wash. Legal Found. v. Alexander,* 984 F.2d 483, 487-88 (D.C.Cir.1993) (*dist'ing Adams v. Richardson,* 480 F.2d 1159 (C.A.D.C.1973) ("Thus, unlike *Adams,* this case does not involve an injunction requiring an agency to 'enforce its own determination that educational institutions have discriminated in violation of Title VI.' Accordingly, assuming without deciding that an *Adams* abdication action might still be available under the APA after our decision in

WEAL, such an action is not available to the appellants in this case.")) Here, as in *Wash. Legal Foundation*, there has been no allegation by plaintiffs that DoE has found any federally funded institution to be in violation of Title IX and has subsequently failed to act to enforce its own determination for some policy reason challenged by plaintiff. *See id.* at 488. As a result, plaintiffs' effort to characterize their challenge as one to a "conscious policy of non-enforcement" is unavailing. *See* Tr. Hr'g 10/15/02 at 42.

Moreover, even if plaintiffs' contention that the 1979 Policy Interpretation and the 1996 Clarification represent a "consciously and expressly adopted," documented, written policy "abdicating ... statutory responsibilities" to enforce Title IX's prohibition against sex discrimination, plaintiffs cannot establish Article III standing for the reasons articulated at length with respect to Counts I and II. *See* Tr. Hr'g 10/15/02 at 42. Whether the agency's alleged crime is one of affirmative action or omission, plaintiffs cannot make the requisite showings of causation, redressability, and associational standing.

COUNTS V, VI, VII--PROCEDURAL DEFECTS

With respect to the claims made in Counts V through VII, raising allegations of procedural defects in the promulgation of the 1979 Policy Interpretation and 1996 Clarification, defendant correctly argues that the "injury-in-fact" requirement of the Article III standing test cannot be met by merely alleging that the government violated the law or a procedural requirement. Def.'s Mot. at 13, *citing Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556, (1984) ("[t]his Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."); *Fund Democracy*, 278 F.3d at 27 ("The mere violation of a procedural requirement does not authorize all

persons to sue to enforce the requirement. A party has standing to challenge an agency's failure to abide by a procedural requirement only if the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.").

Therefore, the only injury claimed by plaintiffs which this Court can consider for the purposes of standing analysis is the elimination of intercollegiate men's sports opportunities and teams, specifically men's wrestling teams, resulting from educational institutions' efforts to comply with Title IX. And, for the reasons set forth in the portions of this opinion addressing Counts I and II, plaintiffs have not met the Article III standing requirements.

C. Merits

COUNT III

While Count III is the only claim for which plaintiffs have made a threshold showing of Article III standing, it is clear on the record before this Court that the allegations relating to Count III are insufficient to confer jurisdiction on this Court.

Plaintiffs' reliance on this section of the Administrative Procedure Act as conferring jurisdiction on this Court to hear their claims is misplaced for several reasons. First and foremost, Section 553, by its terms, does not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice" unless notice or hearing is required by statute. 5 U.S.C. § 553(e). Plaintiffs concede that the 1979 Policy Interpretation and proposed 1996 Clarification challenged in their October 1995 submission are "interpretive rules." Tr. Hr'g 10/15/02 at 52 ("Yeah, they're interpretive rules, I think both of them, both interpreting the regulation.").

Moreover, plaintiffs ask this Court to construe plaintiff NWCA's response to the proposed 1996 Clarification as a

petition to amend or repeal. However, such a construction would be strained to say the least. Defendant clearly points out that plaintiff's October 1995 letter did not expressly ask DoE to amend or repeal its interpretive rules or the 1975 Regulations. It was clearly filed in response to the draft of the 1996 Clarification, for which the letter of transmittal made abundantly clear that DoE did not intend, by soliciting comments on the sufficiency of the *clarification* provided, to revisit the substance of the 1979 Policy Interpretation and the Three Part Test. *See* Tr. Hr'g 10/15/02 at 35; *see also Edison Elec. Inst. v. Interstate Commerce Comm'n*, 969 F.2d at 1230 (refusing to construe a substantive comment as a petition for rescission, noting that "barring extreme arbitrariness," courts defer to the agency's decisions regarding their own dockets); *Henley v. FDA*, 873 F.Supp. 776, 780 (E.D.N.Y.1995) (noting agency's acknowledgment of receipt of petition and assignment of docket number); *Wisconsin Elec. Power Co. v. Costle*, 715 F.2d 323, 325 (7th Cir.1983) (noting that agency itself construed plaintiffs' submission as a petition made pursuant to 5 U.S.C. § 553(e)); *Nader v. Nuclear Regulatory Comm'n*, 513 F.2d 1045, 1049, 1051 (D.C.Cir.1975) (same).

Plaintiffs appear to concede as much given a recently filed, and presumably procedurally proper, petition to amend or repeal. *See* Pl.'s Jan. 16, 2003 Notice of Petition. To the Court's knowledge, the agency has, as of yet, taken no action on the recently filed petition. Therefore, the question of whether a denial of this most recent petition would confer jurisdiction on the Court is not yet ripe. *See id.; Edison Elec. Inst. v. Interstate Commerce Comm'n*, 969 F.2d at 1230.

Finally, even if the Court were to construe plaintiff NWCA's submission during the 1996 Clarification process as a petition which was denied by defendant, plaintiffs would still not be entitled to the relief they are seeking, namely an Order of this Court requiring the defendant to embark on a new rulemaking process. The appropriate remedy where an

agency's response to a petition is found to be deficient is "remand for further explanation or reconsideration, not a mandate to promulgate the requested rule." *Henley v. FDA*, 873 F.Supp. at 786; *WWHT v. FCC*, 656 F.2d at 818, 819 ("Administrative rule making does not ordinarily comprehend any rights in private parties to compel an agency to institute such proceedings or promulgate rules," but "an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject has been removed.") (citations omitted).

V. CONCLUSION

"Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Renne v. Geary*, 501 U.S. 312, 316, 111 S.Ct. 2331, 2336, 115 L.Ed.2d 288 (1991). Before entertaining claims which contemplate taking the dramatic step of striking down a landmark civil rights statute's regulatory enforcement scheme, the Court must take pains to ensure that the parties and allegations before it are such that the issues will be fully and fairly litigated. This is particularly true where the challenged enforcement scheme is one which has benefitted from more than twenty years of study, critical examination, and judicial review, and for which a demonstrated need continues to be recognized by the nation's legislators. In the Court's view, plaintiffs have failed to meet their burden of persuasion on the question of whether they are the proper parties to be asserting the claims they raise against the defendant.

Plaintiffs' general reference in their First Amended Complaint to "hundreds of enforcement actions" initiated by DoE across the nation, absent further allegations with respect to circumstances giving rise to such actions, does not establish a factual record before the Court that is sufficiently particularized to adjudicate plaintiffs' claims. Neither do

plaintiffs' conclusory allegations that such enforcement actions have led to negotiated settlements with educational institutions which have reduced athletic participation opportunities for men, absent any further enunciation of the terms and implementation of those agreements. Nor does plaintiffs' allegation, proposed in the Second Amended Complaint, that NWCA member Northwestern University entered into one such settlement agreement, with harmful consequences to its members, correct this deficiency, given the complete absence of any specific allegations of harm to Northwestern University, its staff, or its students.

Finally, even if plaintiffs' assertions that their educational institution members, such as Northwestern University, are harmed by the challenged policies are accepted at face value, this is not a case where "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *See Warth v. Seldin*, 422 U.S. at 515, 95 S.Ct. 2197. Accordingly, at a minimum, this is one of those unusual cases for which the presence of an association's members is necessary for the Court's proper exercise of jurisdiction over the claims asserted.

The critical importance of the protections offered by Title IX, the significant flexibility built into the DoE's enforcement scheme, and the multiplicity of considerations beyond Title IX which influence educational institutions' athletic decision-making are such that courts cannot take a cavalier approach to the critical question of which parties have standing to challenge enforcement policies promulgated pursuant to the statute. Rather, the core principles of standing doctrine require the Court to exercise particular caution in adjudicating standing questions where the actions and interests of third parties not before the Court are implicated. Plaintiffs' allegations and arguments have fallen far short of what is required to establish standing under the circumstances presented.

Accordingly, for the reasons set forth herein, this Court is without jurisdiction to consider plaintiffs' claims against the DoE. Defendant's motion to dismiss for lack of jurisdiction is therefore **GRANTED** as to all but Count III. Further, defendant's motion to dismiss for failure to state a claim is hereby **GRANTED** with respect to Count III. Plaintiffs' action is therefore dismissed in its entirety. An appropriate Order accompanies this Memorandum Opinion.

United States District Court for the
District of Columbia Circuit.

National Wrestling Coaches Association, Committee to Save Bucknell Wrestling, Marquette Wrestling Club, Yale Wrestling Association, and College Sports Council,
Plaintiffs,

v.

Department of Education,
Defendant.

No. 02-0072-EGS
Filed June 11, 2003

Before: SULLIVAN, District Court Judge.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that plaintiffs' motion for leave to file a Second Amended Complaint is hereby **DENIED**; and it is

FURTHER ORDERED that defendant's motion to dismiss is hereby **GRANTED**; and it is

FURTHER ORDERED that plaintiff's action is hereby **DISMISSED IN ITS ENTIRETY.**

Signed: Emmet G. Sullivan
United States District Judge
June 11, 2003

United States Court of Appeals for the
District of Columbia Circuit.

National Wrestling Coaches Association, Committee to Save Bucknell Wrestling, Marquette Wrestling Club, Yale Wrestling Association, and College Sports Council,

Appellants,

v.

Department of Education,

Appellee.

No. 03-5169
Argued March 16, 2004
Decided May 14, 2004

Before: EDWARDS and HENDERSON, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge EDWARDS.

Dissenting opinion filed by Senior Circuit Judge WILLIAMS.

EDWARDS, Circuit Judge:

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in federally funded educational programs and activities. That prohibition applies to intercollegiate athletics pursuant to regulations promulgated by the Secretary of Health, Education, and Welfare in 1975. Appellee Department of Education ("Department") is charged with enforcing these provisions. The Department assesses universities' compliance with Title IX and the implementing regulations according to various enforcement policies, including a three-part test first issued in 1979 and clarified in 1996.

Appellants are several membership organizations that represent the interests of collegiate men's wrestling coaches, athletes, and alumni, who claim to have been injured by the elimination of men's varsity wrestling programs at certain universities. In this action for declaratory and injunctive relief, appellants challenge only the three-part test enunciated in the 1979 Policy Interpretation and the 1996 Clarification on the grounds that they violate the Constitution, Title IX, the 1975 regulations, and the Administrative Procedure Act ("APA"). Appellants do not challenge the 1975 regulations or any other regulations promulgated pursuant to Title IX. The District Court granted the Department's motion to dismiss for lack of subject matter jurisdiction, on the grounds that appellants lack standing under Article III of the Constitution. The District Court also rejected on the merits appellants' separate claim under the APA that the Department unlawfully denied their petition for amendment or repeal of the enforcement policies.

We affirm the decision of the District Court in all respects. Appellants' alleged injury results from the independent decisions of federally funded educational institutions that choose to eliminate or reduce the size of men's wrestling teams in order to comply with Title IX. Assuming that this allegation satisfies Article III's injury-in-fact requirement, we hold that appellants nevertheless lack standing because they have failed to demonstrate how a favorable judicial decision on the merits of their claims will redress this injury. The Supreme Court has made it clear that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 758, 104 S.Ct. 3315, 3328, 82 L.Ed.2d 556 (1984)).

In this case, appellants offer nothing but speculation to substantiate their assertion that a favorable judicial decision would result in schools altering their independent choices regarding the restoration or preservation of men's wrestling programs. Appellants do not contest the constitutionality of Title IX, nor do they challenge the 1975 regulations. Therefore, that legal regime, which requires schools to take gender equity concerns into account when structuring their athletic programs, would remain in place even if the disputed 1996 Clarification and the 1979 Policy Interpretation were revoked. And under that legal regime, schools would still have the discretion to eliminate men's wrestling programs, as necessary, to comply with the gender equity mandate of Title IX. A judicial decision striking down the 1996 Clarification and the 1979 Policy Interpretation would not afford appellants redress sufficient to support standing.

In the alternative, we hold that, even if they have standing, appellants' claims are barred by § 704 of the APA. The availability of a private cause of action under Title IX directly against the universities themselves constitutes an adequate remedy that precludes judicial review under § 704. Finally, we affirm the District Court's rejection of appellants' claim that the Department unlawfully denied their petition for repeal or amendment of the enforcement policies. Appellants' submissions to the Department cannot be construed as such a petition; and, in any event, the Department's response was not improper.

I. BACKGROUND

Enacted in response to evidence of "massive, persistent patterns of discrimination against women in the academic world," 118 CONG. REC. 5,804 (1972) (statement of Sen. Bayh), Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in federally

funded educational programs and activities. *See* Education Amendments of 1972, Pub.L. No. 92- 318, Title IX, § § 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. § 1681 *et seq.* (2000)). Each federal agency with authority to extend federal financial assistance to an educational program or activity is authorized and directed to ensure the recipient's compliance with Title IX's antidiscrimination mandate through the promulgation of regulations. *See* 20 U.S.C. § 1682. Institutions that fail to comply with Title IX or these regulations face termination of federal funding, though an implementing agency must first attempt to secure voluntary compliance before imposing this ultimate sanction. *See id.* Title IX does not require recipients of federal funding to grant preferential treatment to members of one sex to remedy any disproportion that may exist in the distribution of resources or benefits between sexes, relative to the gender composition of the relevant community. *See* 20 U.S.C. § 1681(b). However, the statute permits the consideration of such an imbalance in enforcement proceedings. *See id.* ("[T]his subsection shall not be construed to prevent the consideration ... of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.").

In 1974, Congress directed the Secretary of Health, Education, and Welfare ("HEW"), the Department's predecessor agency, to promulgate regulations implementing Title IX in the area of intercollegiate athletics. *See* Education Amendments of 1974, Pub.L. No. 93-380, § 844, 88 Stat. 484, 612. As issued in 1975, these regulations prohibit sex-based discrimination in any interscholastic, intercollegiate, club, or intramural athletic program. *See* 45 C.F.R. § 86.41(a) (2003) (subsequently codified at 34 C.F.R. § 106.41(a) (2003)) ("1975 Regulations"). To that end, the regulations require that recipients of federal funding

provide "equal athletic opportunity for members of both sexes." 45 C.F.R. § 86.41(c); 34 C.F.R. § 106.41(c). The Department determines whether an institution provides equal athletic opportunities to both sexes by examining, *inter alia,* "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 45 C.F.R. § 86.41(c)(1); 34 C.F.R. § 106.41(c)(1). These regulations were recodified without substantial change in 1980, after HEW's responsibility for implementing Title IX was transferred to the newly organized Department of Education. *See* Department of Education Organization Act, Pub.L. No. 96-88, § § 301, 505, 93 Stat. 668, 677, 691 (1979) (codified at 20 U.S.C. § § 3411, 3441, 3505 (2000)); 45 Fed.Reg. 30,802, 30,962 (May 9, 1980).

The dispute in this case concerns a policy interpretation adopted by HEW in 1979 and clarified by the Department in 1996, which provides further guidance as to how the Department assesses compliance with Title IX and the 1975 Regulations. *See* 44 Fed.Reg. 71,413 (Dec. 11, 1979) ("1979 Policy Interpretation"). The Policy Interpretation explains that an institution's compliance with the "interests and abilities" requirement of subsection (c)(1) of the 1975 Regulations will be assessed in part pursuant to a three-part test that asks:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of

> that sex; or
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed.Reg. 71,413, 71,418 (Dec. 11, 1979) ("Three-Part Test").

In 1996, after notice and a period for comment, the Department issued a clarification to illuminate the Three-Part Test. The Department's Office for Civil Rights ("OCR") then sent a "Dear Colleague" letter to interested parties explaining that the 1996 clarification confirmed that institutions may comply with the Three-Part Test by meeting any one of the three prongs and that the Three-Part Test is only one of many factors the Department examines to assess an institution's overall compliance with Title IX and the 1975 Regulations. *See Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), *transmitted by* Letter from Norma V. Cantú, Assistant Secretary for Civil Rights, Department of Education (Jan. 16, 1996) ("1996 Clarification"), *reprinted in* Joint Appendix ("J.A.") 143-59. In response to inquiries regarding schools' elimination or capping of men's sports teams as a method of compliance, the letter stated:

> The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men.... Ultimately, Title IX provides institutions with flexibility and choice

> regarding how they will provide nondiscriminatory participation opportunities.

Id. at 4, J.A. 146.

Appellants, the National Wrestling Coaches Association ("NWCA"), the Committee to Save Bucknell Wrestling, the Marquette Wrestling Club, the Yale Wrestling Association, and the College Sports Council, are membership organizations representing the interests of collegiate men's wrestling coaches, athletes, and alumni. They assert injuries arising from decisions by educational institutions to eliminate or reduce the size of men's wrestling programs to comply with the Department's interpretive rules implementing Title IX, specifically the Three-Part Test.

Appellants do not challenge Title IX itself or the 1975 Regulations. *See* Pls.' Mem. Opp'n Mot. Dismiss at 2, *reprinted in* J.A. 173; Am. Compl. ¶ 66, *reprinted in* J.A. 31; Appellants' Br. at 3, 6; Appellants' Reply Br. at 1; Oral Argument Recording at 1:02:03 (Mar. 16, 2004). As they emphasized throughout their pleadings before the District Court and in their briefs and oral argument before this court, appellants' central premise is that the enforcement policy embodied in the 1979 Policy Interpretation and the 1996 Clarification - *i.e.*, the Three-Part Test - violates the equal protection component of the Due Process Clause of the Fifth Amendment and exceeds the Department's statutory authority by requiring the very same intentional discrimination that Title IX prohibits. Alternatively, appellants claim that the Department's policies amount to an abdication of its duty to enforce Title IX. Appellants further argue that these policy statements violate the 1975 Regulations by replacing that regime of "equal opportunity based on interest," a standard appellants embrace, with a regime of "equal participation based on enrollment," a

standard appellants denounce as an impermissible preference in favor of women.

Appellants also allege several procedural infirmities in the 1979 Policy Interpretation and the 1996 Clarification that they argue render these interpretive rules invalid under the APA and other statutes. Finally, appellants claim that the Department acted unlawfully by denying without explanation a petition filed by NWCA for repeal or amendment of the 1979 Policy Interpretation. Appellants base this claim on two letters NWCA submitted to the Department in October 1995, during the comment period preceding the 1996 Clarification. In their amended complaint, appellants sought declaratory and injunctive relief, asking the District Court to vacate the 1996 Clarification and the Three-Part Test and remand the rules to the Department with instructions to "commence notice-and-comment rulemaking to amend those rules consistent with Title IX, the U.S. Constitution, and [the] Court's declaratory relief in this action." Am. Compl. ¶ 99, J.A. 40.

The Department moved to dismiss appellants' case for, *inter alia*, lack of subject matter jurisdiction, on the grounds that appellants lack standing to pursue these claims. After that motion was briefed and argued before the District Court, appellants sought leave to amend their complaint a second time to add the Secretary of Education and the Assistant Secretary for Civil Rights as defendants in their official capacities and to allege that NWCA includes among its members several unspecified educational institutions. The District Court denied appellants' motion to amend and granted the Department's motion to dismiss, holding that appellants had failed to allege sufficient facts demonstrating their standing and that nothing in the proffered second amended complaint would cure this jurisdictional defect. *See Nat'l Wrestling Coaches Ass'n v. United States Dep't of Educ.*, 263 F.Supp.2d 82, 104-27 (D.D.C.2003). The District Court

rejected on its merits appellants' APA claim regarding the NWCA petition for repeal or amendment of the 1979 Policy Interpretation. *See id.* at 127-28. This appeal followed.

II. ANALYSIS

A. Standing

Appellants' attacks in this lawsuit are aimed solely at the Department's 1979 Policy Interpretation and the 1996 Clarification. They do not challenge Title IX or the 1975 Regulations. Indeed, a central theory of their argument on the merits is that the Department's 1979 and 1996 actions are unlawful, in part, because they violate the statute and the 1975 Regulations. With this context in mind, it is clear that appellants have no standing to pursue this challenge, because they have not demonstrated that their alleged injuries will be redressed by the requested relief. The direct causes of appellants' asserted injuries - loss of collegiate-level wrestling opportunities for male student-athletes - are the independent decisions of educational institutions that choose to eliminate or reduce the size of men's wrestling teams. Appellants offer nothing but speculation to substantiate their claim that a favorable decision from this court will redress their injuries by altering these schools' independent decisions. Absent a showing of redressability, appellants have no standing to challenge the Department's enforcement policies, and we have no jurisdiction to consider their claims.

To satisfy the requirements of Article III standing in a case challenging government action, a party must allege an injury in fact that is fairly traceable to the challenged government action, and "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan,* 504 U.S. at 560-61, 112 S.Ct. at 2135 (quoting *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 38, 43, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976)). Where, as

here, the plaintiff is an association seeking to sue on behalf of its members, that plaintiff must demonstrate that (1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). Accordingly, appellants must establish that at least one of their members has suffered a cognizable injury that is fairly traceable to the Department's Three-Part Test and likely to be redressed by a judicial decision declaring the Three-Part Test to be unlawful and enjoining its use.

Appellants' principal theory of injury is that the Department's interpretive rules harm their member coaches, athletes, and alumni by causing educational institutions to eliminate or reduce the size of men's wrestling teams. Under appellants' view, schools comply with the Three-Part Test not by offering increased athletic opportunities to female students, but by reducing the opportunities available to male students. In support of this theory, appellants point to recent actions by Bucknell, Marquette, and Yale Universities either eliminating their men's wrestling teams or demoting them to non-varsity status. *See* Am. Compl. ¶ ¶ 50-52, J.A. 27-28. Appellants contend that these schools took these adverse actions in order to satisfy the Three-Part Test, which permits a finding that a school is in compliance with Title IX if, among other things, it offers athletic opportunities to members of both sexes in numbers that are substantially proportionate to the gender composition of the student body as a whole. For example, appellants assert that a press release accompanying Bucknell University's announcement in May 2001 that it would discontinue its intercollegiate wrestling program "cite[d] Title IX's proportionality

requirements as Bucknell's reason for eliminating the wrestling team." *Id.* ¶ 50, J.A. 27. Similarly, appellants allege that after Marquette University announced the disbanding of its wrestling program in 2001, the Marquette athletic director made a statement at a dinner party "indicat [ing] that Marquette might bring back its wrestling program if the legal requirements changed." *Id.* ¶ 51, J.A. 27. Finally, appellants allege that when Yale University demoted its intercollegiate varsity wrestling team to club status in 1991 for budgetary reasons, it refused offers of private funding, and, "[o]n information and belief, Yale declined to accept the endowment because of Title IX." *Id.* ¶ 52, J.A. 28.

We review *de novo* the District Court's decision as to standing. *See Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C.Cir.2003). Because the District Court disposed of appellants' complaint on a motion to dismiss, we must assume that general factual allegations in the complaint embrace those specific facts that are necessary to support the claim. *See Lujan*, 504 U.S. at 561, 112 S.Ct. at 2135. Thus, in company with the District Court, we assume that appellants have stated a cognizable injury-in-fact. Nonetheless, even applying this generous standard of review, we find that appellants' factual allegations are insufficient to establish standing, because appellants have not shown how a favorable decision vacating the 1979 Policy Interpretation and the 1996 Clarification would redress their injuries. *See Warth v. Seldin*, 422 U.S. 490, 504, 95 S.Ct. 2197, 2208, 45 L.Ed.2d 343 (1975).

When a plaintiff's asserted injury arises from the Government's regulation of a third party that is not before the court, it becomes "substantially more difficult" to establish standing. *Lujan*, 504 U.S. at 562, 112 S.Ct. at 2136 (citing *Allen v. Wright*, 468 U.S. 737, 758, 104 S.Ct. 3315, 3328, 82 L.Ed.2d 556 (1984)); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-46, 96 S.Ct. 1917, 1925-28, 48 L.Ed.2d 450

(1976); *Freedom Republicans, Inc. v. FEC,* 13 F.3d 412, 416 (D.C.Cir.1994). Because the necessary elements of causation and redressability in such a case hinge on the independent choices of the regulated third party, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan,* 504 U.S. at 562, 112 S.Ct. at 2137. In other words, mere "unadorned speculation" as to the existence of a relationship between the challenged government action and the third-party conduct "will not suffice to invoke the federal judicial power." *Simon,* 426 U.S. at 44, 96 S.Ct. at 1927.

In several cases, the Supreme Court has made clear that a plaintiff's standing fails where it is purely speculative that a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries. In *Simon,* for example, organizations representing the interests of low-income persons challenged an IRS Revenue Ruling that allowed favorable tax treatment to nonprofit hospitals that offered only emergency-room services to indigents. *See Simon,* 426 U.S. at 28, 96 S.Ct. at 1919. The Court held that the plaintiffs lacked standing because their alleged injury - denial of access to certain hospital services - was caused by the regulated hospitals. *See id.* at 40-46, 96 S.Ct. at 1925- 28. Even accepting the plaintiffs' averment that the IRS's policy encouraged hospitals to provide fewer services to indigents, *id.* at 42 n. 23, 96 S.Ct. at 1926 n. 23, the Court found it "speculative whether the desired exercise of the court's remedial powers ... would result in the availability to [the plaintiffs] of such services," *id.* at 43, 96 S.Ct. at 1926. Rather, "[s]o far as the complaint shed[ ] light, it [was] just as plausible that the hospitals to which [the plaintiffs] may apply for service would elect to forego favorable tax treatment to avoid the undetermined financial drain of an

increase in the level of uncompensated services." *Id.* Accordingly, the Court found that the plaintiffs' complaint was "insufficient even to survive a motion to dismiss." *Id.* at 45 n. 25, 96 S.Ct. at 1927 n. 25.

Similarly, in *Allen v. Wright,* 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), the Court held that parents of Black public school children lacked standing to challenge IRS tax policies toward racially discriminatory private schools. *Id.* at 739-40, 104 S.Ct. at 3318-19. The Court found it to be "entirely speculative ... whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Id.* at 758, 104 S.Ct. at 3328. And in *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), the Court affirmed the dismissal of plaintiffs' complaint that the defendant town's zoning ordinance effectively excluded persons of low and moderate income from living there. Assuming that the ordinance contributed, "perhaps substantially," to the cost of housing in the town, *id.* at 504, 95 S.Ct. at 2208, the Court nevertheless found that the plaintiffs failed in their obligation to allege facts showing that they would have been able to buy or rent homes in the town if the Court granted their requested remedy, *id.* The "remote possibility, unsubstantiated by allegations of fact, that their situation ... might improve were the court to afford relief," did not suffice to establish the redressability of the plaintiffs' injuries. *Id.* at 507, 95 S.Ct. at 2209-10.

More recently, this court held that an independent, multiracial organization of Republicans lacked standing to challenge the Federal Election Commission's ("FEC") funding of the Republican National Convention on the grounds that the Republican Party's delegate-selection processes discriminated against minority groups. *See Freedom Republicans,* 13 F.3d 412. The court found that, although the level of FEC funding was substantial, the alleged injury was not fairly traceable to any encouragement

by the Government and "we [could not] begin to predict" the impact of withdrawal of federal funding on the Party's decisions as to delegate selection. *Id.* at 418-19.

In this case, appellants offer nothing to substantiate their assertion that a decision from the court vacating the 1979 Policy Interpretation and the 1996 Clarification will redress their injuries by altering schools' independent decisions whether to eliminate or retain their men's wrestling programs. As the Department emphasized when issuing its 1996 Clarification, nothing in the Three-Part Test requires schools to eliminate or cap men's wrestling or any other athletic program. *See* 1996 Clarification at 4, J.A. 146. *This clarification is consistent with the fact that Bucknell and Marquette maintained their men's wrestling programs for decades after the adoption of the Three-Part Test.*

Appellants do not suggest that any particular school necessarily would forego elimination of a wrestling team or reinstate a previously disbanded program in the absence of these interpretive rules, except to say that Marquette University "might bring back its wrestling program if the legal requirements changed." Am Compl. ¶ 51, J.A. 27. Indeed, appellants appear to understand that judicial relief in this case would not afford the remedy that they seek. At oral argument, counsel for appellants candidly said that, if his clients prevail, appellants think they may have "better odds" of retaining their desired wrestling programs. Counsel's candor was admirable, but a quest for ill-defined "better odds" is not close to what is required to satisfy the redressability prong of Article III.

On the record at hand, appellants fall far short of establishing the requisite likelihood that the educational institutions whose choices lie at the root of appellants' alleged injuries will behave any differently with respect to men's wrestling if appellants prevailed on the merits and secured their requested relief. Indeed, in the posture of this

case, it is difficult to imagine how appellants could make such a showing. Even if appellants prevailed on the merits in their challenge to the Three-Part Test, Title IX and the 1975 Regulations would still be in place. Federally funded schools would still be required to provide athletic opportunities in a manner that equally accommodated both genders. *See* 45 C.F.R. § 86.41(c); 34 C.F.R. § 106.41(c). As a consequence, nothing but speculation suggests that schools would act any differently than they do with the Three-Part Test in place. Schools would remain free to eliminate or cap men's wrestling teams and may in some circumstances feel compelled to do so to comply with the statute and the 1975 Regulations. This is particularly so since Title IX itself permits evidence of disproportion in the distribution of benefits between sexes to be considered in enforcement proceedings against recipients of federal funding. *See* 20 U.S.C. § 1681(b). Moreover, other reasons unrelated to the challenged legal requirements may continue to motivate schools to take such actions. *See* Bucknell Univ. News Release (May 2, 2001), *reprinted in* J.A. 573 (explaining that Bucknell's gender equity plan was not only "a matter of federal law," but also "morally ... the right thing to do").

Appellants' request for a judicial order compelling the Department to undertake notice-and-comment rulemaking to amend its enforcement policies does not alter this analysis. The challenged policies - the 1979 Policy Interpretation and the 1996 Clarification - are interpretive guidelines that the Department was not obligated to issue in the first place. Appellants point to no basis for the notion that the Department would be required to replace the challenged policies with anything new, were the court to invalidate the existing 1979 Policy Interpretation and the 1996 Clarification. And, in any event, appellants do not even challenge the underlying 1975 Regulations, which, as we have noted, clearly permit universities to follow some of the

practices that appellants oppose. Accordingly, appellants have failed to establish that it is likely that a favorable decision from the court on the merits of their claims would provide any redress for their alleged injuries.

We recognize that courts occasionally find the elements of standing to be satisfied in cases challenging government action on the basis of third-party conduct. These cases fall into two easily distinguishable categories. First, a federal court may find that a party has standing to challenge government action that permits or authorizes third-party conduct that would otherwise be illegal in the absence of the Government's action. *See Animal Legal Def. Fund, Inc. v. Glickman,* 154 F.3d 426, 440-44 (D.C.Cir.1998) (en banc) ("*ALDF*"); *see also Consumer Fed'n of Am. v. FCC,* 348 F.3d 1009, 1012 (D.C.Cir.2003); *America's Cmty. Bankers v. FDIC,* 200 F.3d 822, 827-29 (D.C.Cir.2000); *Tel. & Data Sys., Inc. v. FCC,* 19 F.3d 42, 46-47 (D.C.Cir.1994). In *ALDF,* for example, we upheld a plaintiff's standing to challenge U.S. Department of Agriculture ("USDA") regulations concerning the treatment of primates by zoos and other exhibitors of animals. *See* 154 F.3d 426. The plaintiff in that case alleged aesthetic injuries that resulted from observing primates living in allegedly inhumane conditions. *See id.* at 429- 30. Although this injury resulted from the actions of third parties that chose to maintain their captive primates in such conditions, we held that the plaintiff had standing to challenge the USDA regulations. *See id.* at 438- 44. The plaintiff alleged that the regulations permitted exhibitors to maintain primates in inhumane conditions, even though such conduct would have been illegal in the absence of those regulations. *See id.* at 438. Accordingly, a favorable decision would redress the plaintiff's injury because animal exhibitors would no longer be able to keep animals in inhumane living conditions without violating the law. *See id.* at 443. Causation and redressability thus are satisfied in this

category of cases, because the intervening choices of third parties are not truly independent of government policy. Moreover, they could only preclude redress if those third parties took the extraordinary measure of continuing their injurious conduct in violation of the law. *See id.* at 441 (citing *Int'l Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 811 (D.C.Cir.1983)).

These cases would only support appellants' assertion of standing if appellants took the position that gender-conscious elimination of men's sports teams would be illegal in the absence of the challenged enforcement policies. Appellants make no such claim. As we have emphasized, appellants do not challenge Title IX or the 1975 Regulations; indeed, they embrace those regulations, which they characterize as properly requiring schools to provide "equal opportunity based on interest." Necessarily, then, they must concede that schools *may* make gender-conscious decisions in order to remedy discrimination and equally accommodate both sexes, in compliance with the statute and regulations. *See* 45 C.F.R. § 86.41(c)(1); 34 C.F.R. § 106.41(c)(1). This includes considering "statistical evidence tending to show that ... an imbalance exists [between men and women] with respect to the participation in" intercollegiate athletic programs in a school. *See* 20 U.S.C. § 1681(b). Therefore, even if the Three-Part Test were vacated, schools would remain free to take gender into account when designing and funding their athletic programs. The "causation by authorization" theory of this first category of cases thus lends no support to appellants' claim of standing.

Second, some cases have held that plaintiffs have standing to challenge government action on the basis of injuries caused by regulated third parties where the record presented substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of

redress. In *Tozzi v. United States Department of Health & Human Services,* 271 F.3d 301 (D.C.Cir.2001), for example, a manufacturer of medical supplies made of PVC plastic challenged a decision by the Secretary of Health and Human Services to add the chemical dioxin to the category of "known" carcinogens. The manufacturer alleged that the decision harmed its business reputation and profits, because concern over the dioxin hazards associated with the incineration of PVC plastic deterred the manufacturer's customers from purchasing its products. *See id.* at 307-08. We held that the manufacturer had standing. *See id.* at 308-10. The record left "little doubt" that the Government's authoritative statement regarding the carcinogenicity of dioxin was a substantial factor motivating the decisions of the third parties that were the direct source of the plaintiff's injuries. *See id.* at 308-09. Specifically, the plaintiff introduced affidavits and other record evidence demonstrating that municipalities and health care organizations opted to phase out their use of PVC plastic as a direct result of the Secretary's decision. *See id.* Moreover, the court noted that "[w]hen the government attaches an inherently pejorative and damaging term such as 'carcinogen' to a product, the probability of economic harm increases exponentially." *Id.* at 309. Based on this record evidence, the court found it "not at all 'speculative' " that the addition of dioxin to the list of known carcinogens caused municipalities and companies to reduce or end their use of PVC plastic, and that a decision setting aside the Government's action likely would prevent that result. *Id.* at 309-10.

Similarly, in *Block v. Meese,* 793 F.2d 1303 (D.C.Cir.1986), we held that a film distributor had standing to challenge a decision by the Government to classify as "political propaganda" certain films that the plaintiff wished to distribute. The plaintiff alleged that the government action harmed his economic interests, because potential customers

would no longer purchase the films from the plaintiff, thus reducing his company's profits. *Id.* at 1308. In support of this claim, the plaintiff submitted several declarations and affidavits detailing specific instances in which potential customers declined to take the films because of the classification. *See id.* The court found these factual assertions to be sufficient to establish harm that was attributable to the Government's action. *See id.* at 1308-09; *see also Motor & Equip. Mfrs. Ass'n v. Nichols,* 142 F.3d 449, 457-58 (D.C.Cir.1998) (finding that the petitioner had standing to challenge government action based on the independent conduct of third parties where evidence demonstrated that the challenged action "resulted in an almost unanimous decision" by those third parties to take action that harmed the petitioner); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.,* 901 F.2d 107, 113-18 (D.C.Cir.1990) (finding "overwhelming evidence" in the administrative record to support a conclusion that third parties' decisions were not substantially independent of the challenged government action and that those third parties were likely to alter their behavior in response to favorable judicial action).

Appellants' reliance in this case on the *possibility* that their members may have "better odds" of retaining their desired wrestling programs plainly falls far short of the mark set by *Tozzi* and other such cases. The cases on which appellants rely require "formidable evidence" of *causation, see Freedom Republicans,* 13 F.3d at 418 (distinguishing *Women's Equity Action League v. Cavazos,* 879 F.2d 880 (D.C.Cir.1989)). With such evidence, the court is easily able to discern redressability. There is no such evidence in this case.

While our discussion thus far has emphasized the lack of redressability in appellants' complaint, appellants' submissions similarly fail to demonstrate that causation is so clear that redressability inexorably follows. For example, appellants' amended complaint cited a press release in

which Bucknell University announced the elimination of its men's wrestling team - some 22 years after the adoption of the Three-Part Test - and cited gender proportionality as one reason for its decision. *See* Am. Compl. ¶ 50, J.A. 27. That same press release, however, also cites the absence of league sponsorship for wrestling, budgetary concerns, and the need to balance the athletic program with other University priorities as other factors contributing to the decision. *See* Bucknell Univ. News Release (May 2, 2001), J.A. 573-78.

Appellants also rely on a report issued by the General Accounting Office ("GAO") in March 2001, discussing the experiences of four-year colleges in adding and discontinuing men's and women's athletic teams between 1981 and 1999. *See* GEN. ACCOUNTING OFFICE, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES' EXPERIENCES ADDING AND DISCONTINUING TEAMS (2001), *reprinted in* J.A. 366-81. This report does not advance appellants' case. First, although the GAO found evidence that numerous men's athletic teams were eliminated over the period covered in the study - 519 teams discontinued between the 1981-82 and 1998-99 academic years, to be precise - the GAO also found that even more new men's teams were created in that same time-frame (555 men's teams between the 1981-82 and 1998-99 years). *See id.* at 13, J.A. 372. What is more telling, however, is that the GAO's discussion of the role that gender equity concerns played in schools' decisions to add or eliminate teams, upon which appellants rely heavily, is utterly inconclusive as to whether the Three-Part Test caused the elimination of any men's athletic teams. The GAO notes that a majority of surveyed schools cited "gender equity considerations" as an influential factor in their decisions to discontinue men's teams. *Id.* at 20, J.A. 379. The report does not define "gender equity concerns." We do not know, on the basis of this report, whether these concerns are

self-imposed or legally required. To the extent they reflect legal requirements, we do not know whether they refer to the Three-Part Test or to Title IX and the 1975 Regulations, which appellants do not challenge. Finally, the GAO also found that several other factors also contributed to schools' decisions as much or more than "gender equity considerations," including levels of student interest and limits on funding and other resources. *See id.*

Recently, in *Crete Carrier Corp. v. Environmental Protection Agency,* 363 F.3d 490 (D.C.Cir.2004), operators of five large-haul truck fleets challenged the Environmental Protection Agency's refusal to reconsider the 2004 Standard for nitrous oxide and nonmethane hydrocarbon emissions from " 'heavy heavy-duty' " diesel engines. Because the trucking companies failed to show that their injury was fairly traceable to the 2004 Standard, the court dismissed their petition for lack of standing under Article III. In reaching this conclusion, the court held:

> The Trucking Companies offer only assertions, not facts, to support their claims about the likely response of engine manufacturers to repeal of the 2004 Standard. That will not do. Speculative and unsupported assumptions regarding the future actions of third-party market participants are insufficient to establish Article III standing. Without actual evidence of how engine manufacturers would respond to relaxation or rescission of the 2004 Standard - and the Trucking Companies have proffered none - we can not "wade into this morass of marketplace analys[i]s," and emerge with the conclusion the engine manufacturers would revert to producing pre-October 2002 engines.

Id. at 494 (internal citations omitted). Appellants in this case face the same problem. They have offered nothing but

"unadorned speculation" to suggest that the schools covered by Title IX would change their decisions if appellants were to prevail in this case.

Tozzi and *Block* offer no solace for appellants, for causation in those cases was clear. There is nothing in *Tozzi* and *Block* indicating that the third parties whose conduct injured the plaintiffs would have had reason to continue their injurious conduct unaltered in the absence of the challenged government action. In this case, by contrast, the continued vitality of Title IX itself and the 1975 Regulations means that schools must continue to take gender equity into account when designing their athletic programs. And appellants have offered nothing to indicate that the schools will act any differently than they have in the past regarding decisions to comply with Title IX.

The case law makes clear that one need not adopt the view that a challenged government policy is totally ineffectual to find that the likelihood of redress is too speculative to confer standing upon a plaintiff. Surely, in *Simon,* it would not have been implausible to hypothesize that the potential loss of a valuable tax exemption might affect hospitals' decisions regarding treatment of the indigent. Indeed, the Court accepted the plaintiffs' assertion in that case that the challenged IRS tax policy encouraged hospitals to provide fewer services to indigents. *See Simon,* 426 U.S. at 42 n. 23, 96 S.Ct. 1917. Similarly, in *Freedom Republicans,* it would not have been beyond the pale to assume that the Republican Party might alter its convention policies if it faced termination of its substantial public funding, and the court accordingly acknowledged that the Party "would inevitably face a problem if its funding, but not that of the Democrats, were to be withdrawn." *Freedom Republicans,* 13 F.3d at 419. Abstract theory and conjecture are not enough to support standing, however. The Supreme Court has repeatedly rejected the notion that a finding of

standing may be based on such "unadorned speculation." *Simon*, 426 U.S. at 44, 96 S.Ct. 1917.

In sum, appellants' allegations of causation are far from persuasive. If causation were the only issue in this case, appellants' proffers might be adequate to survive a motion to dismiss. The problem here is that appellants have failed completely to satisfy the redressability prong of Article III standing, for there is nothing to support appellants' claim that a favorable ruling would alter the schools' conduct. To survive a motion to dismiss, a plaintiff "must allege facts from which it reasonably could be inferred that, absent the [challenged policy], there is a substantial probability that ... if the court affords the relief requested, the asserted [injury] will be removed." *Warth*, 422 U.S. at 504, 95 S.Ct. 2197. Appellants' attempts to show redressability are based on nothing but "unadorned speculation."

To avoid these difficulties, plaintiffs turn to the "unequal footing" theory of standing underlying the Supreme Court's decisions in *Gratz v. Bollinger*, 539 U.S. 244, 259-63, 123 S.Ct. 2411, 2422-23, 156 L.Ed.2d 257 (2003), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210-12, 115 S.Ct. 2097, 2104-05, 132 L.Ed.2d 158 (1995). Under the holdings of these decisions, when a plaintiff challenges a competitive process, such as university admissions or contract bidding, on the grounds that discrimination in the process prevents the plaintiff from competing on equal footing, the plaintiff need not demonstrate that, but for the discrimination, he would have gained admission to the university or won the contract. *See Gratz*, 539 U.S. at 261, 123 S.Ct. at 2423; *Adarand*, 515 U.S. at 211, 115 S.Ct. at 2104. Rather, a plaintiff obtains redress in such a case because a favorable court decision eliminates the discrimination that tainted the process and permits competition on an equal basis.

These "unequal footing" cases are inapposite here. In both *Gratz* and *Adarand,* the challenged policies *directly* injured the plaintiffs, without any intervening, third-party decision maker. Accordingly, these cases do not resolve the difficulties appellants face as a result of the role of third parties in causing their alleged injuries. In this case, by contrast, it is purely speculative whether a decision in appellants' favor would alter the process by which schools determine whether to field certain sports teams. Even if the court invalidated the Department's Three-Part Test, schools might nevertheless continue to eliminate or cap men's wrestling teams in order to comply with Title IX or the 1975 Regulations, or for some other unrelated reason. Save for their speculation about "better odds," appellants would be no better off than they are under the Department's current policies.

Appellants' remaining theory of standing likewise lacks merit. Appellants claim that the regulations compel their member coaches and athletic directors to act as "involuntary participants" in illegal discrimination. An "involuntary participant," however, has standing only to the extent that the victims of the alleged discrimination themselves have standing. *See Fraternal Order of Police v. United States,* 152 F.3d 998, 1002 (D.C.Cir.1998) ("[W]here a person is effectively used by the government to implement a discriminatory scheme, he may ... attack that scheme by raising a third party's constitutional rights.") (internal quotation marks and citations omitted); *see also Lutheran Church-Missouri Synod v. FCC,* 141 F.3d 344, 350 (D.C.Cir.1998). As we have discussed at length, the alleged victims of the alleged discrimination - *i.e.,* the male student-athletes and coaches that appellants represent - lack standing in their own right. The "involuntary participant" theory cannot confer standing upon appellants that these student-athletes and coaches do not independently possess.

As a final matter, the District Court did not abuse its discretion in denying appellants' request for leave to amend their complaint a second time, because none of the allegations in the proffered second amended complaint supply the missing elements of appellants' standing. The court of appeals reviews a district court's denial of a motion for leave to amend for abuse of discretion, "requiring only that the court base its ruling on a valid ground." *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C.Cir.1996). While leave to amend "shall be freely given when justice so requires," Fed.R.Civ.P. 15(a), a district court has discretion to deny a motion to amend on grounds of futility where the proposed pleading would not survive a motion to dismiss, *see James Madison Ltd.*, 82 F.3d at 1099.

Here, as the District Court found, the proposed amendment would be futile, because none of the allegations in the second amended complaint suffice to demonstrate appellants' standing. The inclusion of the Secretary of Education and the Assistant Secretary for Civil Rights as defendants in their official capacities adds nothing to appellants' assertion of standing. The addition of unspecified educational institutions as members of the NWCA likewise does not alter the analysis. While a federally funded school might, in an appropriate case, have standing in its own right to challenge the Department's regulations, appellants' second amended complaint does not allege with any specificity how any particular member school has been injured by the regulations. *See* Second Am. Compl. ¶ ¶ 4, 63-64, *reprinted in* J.A. 538, 552. Because the proposed pleading would not survive a motion to dismiss for lack of standing, the District Court did not abuse its discretion in denying as futile appellants' motion for leave to amend their complaint. *See James Madison Ltd.*, 82 F.3d at 1099.

Appellants have no Article III standing. We therefore affirm the District Court's dismissal of appellants' claims for lack of jurisdiction.

B. Adequate Remedy

In the alternative, even if appellants had standing to pursue these claims, the availability of a private cause of action directly against universities that discriminate in violation of Title IX constitutes an adequate remedy that bars appellants' case. Section 704 of the APA subjects to judicial review "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (2000). In *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court held that plaintiffs have a private cause of action for sex discrimination under Title IX against universities.

Following *Cannon*, in *Washington Legal Foundation v. Alexander*, 984 F.2d 483 (D.C.Cir.1993), this court considered a challenge to the Department's implementation of Title VI of the Civil Rights Act of 1964. The plaintiffs in that case asserted an APA cause of action to compel the Department to enforce Title VI against universities that allegedly offered certain scholarships only to minority students. *See id.* at 486. Applying the Title IX holding of *Cannon* in the parallel regime of Title VI, the court held that plaintiffs' alternative remedy - proceeding directly against the individual universities - precluded any suit against the Department under the APA. *See id.* Under *Washington Legal Foundation*, appellants' claims against the Department are plainly barred. *See also Women's Equity Action League v. Cavazos*, 906 F.2d 742, 750-51 (D.C.Cir.1990); *Council of and for the Blind v. Regan*, 709 F.2d 1521, 1531-33 (D.C.Cir.1983) (en banc).

Appellants argue that the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S.Ct. 1511, 149

L.Ed.2d 517 (2001), alters this result. We disagree. *Sandoval* held that private individuals have no implied cause of action to enforce *disparate-impact regulations* promulgated under Title VI of the Civil Rights Act, which prohibits only intentional discrimination. *See id.* at 278-93, 121 S.Ct. at 1515-23. In a notably strained argument, appellants claim that *Sandoval* effectively eliminates the implied cause of action, recognized in *Cannon,* to enforce the prohibition on *intentional discrimination* that derived from the statute itself. Appellants thus contend that they no longer have any cause of action against the universities, and, consequently, there is no alternate remedy precluding their suit under the APA.

Sandoval does not purport to overrule *Cannon*'s allowance of a cause of action to enforce the statutory prohibition against intentional discrimination under Title IX. Thus, the cause of action recognized in *Cannon* remains viable. *See id.* at 279-81, 121 S.Ct. at 1515-17. That is fatal to appellants' claims here. In this case, appellants do not seek to enforce disparate-impact requirements that go further than the facial requirements of the statute itself, as was the posture in *Sandoval.* Rather, to the extent that they view the Three-Part Test as embodying a disparate-impact requirement, they seek to eliminate that policy as inconsistent with the statute's ban on intentional discrimination. In other words, the only policy appellants wish to enforce in this case is the prohibition against intentional discrimination and the equal opportunity requirements found in Title IX and the 1975 Regulations. *Sandoval* explicitly recognized in its discussion of *Cannon* that such a cause of action against the universities remains available to appellants. *See id.*

5 U.S.C. § 704 says that a cause of action may arise under the APA for "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." Seeking to avoid the "adequate

remedy" limitation of § 704, appellants argue that the Department's interpretive policies constitute "[a]gency action made reviewable by statute." This argument is plainly foreclosed by the court's decision in *Washington Legal Foundation. See* 984 F.2d at 486. Appellants in *Washington Legal Foundation* contended that they had an APA cause of action against the Department of Education because the Government failed to enforce Title VI against schools that reserved scholarship funds solely for minority students. The court held that appellants' APA cause of action was barred by § 704, because of the availability of an adequate alternative remedy in the form of an implied right of action under Title VI. *Id.* at 486.

In this case, as in *Washington Legal Foundation,* there is no legislation pursuant to which agency actions under Title IX are made reviewable by statute. The reference to agency actions "made reviewable by statute" in § 704 relates to statutory provisions *other than the APA* that govern judicial review of those actions. When pressed, appellants could point to no such provisions that apply in this case. Therefore, even assuming, *arguendo,* that appellants could demonstrate standing, the "adequate remedy" provision under § 704 would still bar their APA claim. *See id.* at 486.

Appellants next attempt to evade the limitation in § 704 by advancing assorted non-statutory causes of action, which they variously characterize as an *ultra vires* claim, an equitable claim, or a claim in the style of *Leedom v. Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). Without delving into their particulars, we find that these alternatives fail. Even under these theories, appellants must depend on the waiver of sovereign immunity in § 702 of the APA, which applies to any suit, whether advanced under the APA or not. *See Chamber of Commerce v. Reich,* 74 F.3d 1322, 1328 (D.C.Cir.1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not.").

However, the waiver of sovereign immunity under § 702 is limited by the "adequate remedy" bar of § 704. *See Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 607 (D.C.Cir.1992) ("The APA excludes from its waiver of sovereign immunity ... claims for which an adequate remedy is available elsewhere."). The availability of a private cause of action under Title IX directly against the universities thus bars appellants' assertion of non-APA causes of action, because there is no waiver of sovereign immunity where appellants have an adequate alternative remedy in court.

Appellants also argue that a suit against a university that eliminates its men's wrestling team cannot provide an "adequate remedy" for the alleged unlawfulness of the Department's enforcement policies. In a suit against a university, they contend, they would not be able to air their challenges to the Three-Part Test, particularly their claim that the Department has abdicated its duty to enforce Title IX. Again, however, appellants cannot escape the import of our holding in *Washington Legal Foundation*, which rejected a similar argument. *See* 984 F.2d at 486-88. As that case held, even if the "adequate remedy" limitation were not an obstacle, no abdication claim is available where appellants do not allege that the Department has continued to fund an institution specifically found to be in violation of Title IX. *See id.* at 487-88 (distinguishing *Adams v. Richardson*, 480 F.2d 1159 (D.C.Cir.1973)); *see also Ass'n of Civilian Technicians v. FLRA*, 283 F.3d 339, 344 (D.C.Cir.2002). Here, appellants make no such allegations.

In any event, the experience in our sister circuits demonstrates that challenges to the lawfulness of the Department's policies in fact may be aired in a suit against a university, to the extent that the defendant university attempts to justify its actions by reference to those policies. *See, e.g., Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763, 766-73 (9th Cir.1999); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270-72

(7th Cir.1994); *see also Cohen v. Brown Univ.*, 991 F.2d 888, 899-901 (1st Cir.1993). In these and other cases, parties have had the opportunity to litigate the propriety of the Department's Three-Part Test under the Constitution, Title IX, the 1975 Regulations, and principles of administrative law. Our holding today thus does not prevent appellants from obtaining review of their claims on the merits, when raised in a judicially reviewable case or controversy.

Appellants finally contend that a suit against a university is an inadequate alternative because it would not permit them to obtain a judicial order compelling the Department to initiate a new rulemaking to replace the Three-Part Test. As we noted in our discussion of standing, however, the Three-Part Test is an interpretive guideline that the Department was never obligated to issue in the first place. Appellants again fail to point to any authority suggesting that the Department would be required to develop a new interpretive rule in the event the court invalidated the Three-Part Test.

Accordingly, we hold that, even if appellants had standing to challenge the Department's enforcement policy, their case would be barred by the "adequate remedy" limitation of § 704 of the APA.

C. Petition to Repeal or Amend

Finally, we affirm the decision of the District Court rejecting appellants' claim that the Department unlawfully denied NWCA's petition to amend or repeal the Three-Part Test. Section 553(e) of the APA requires agencies to give interested parties the right to petition for the issuance, amendment, or repeal of a rule. *See* 5 U.S.C. § 553(e) (2000). Section 555(e) further provides that an agency shall give prompt notice and a brief explanation of the grounds for the denial of such a petition. *See* 5 U.S.C. § 555(e). In October 1995, after the Department solicited comments on its

proposed clarification of the Three-Part Test, appellant NWCA submitted two letters to the Department expressing its dissatisfaction with the Three-Part Test. *See* J.A. 160-66. The letters requested no specific action, but stated that if the Department did not "clarify [its policies] in a manner which permits male sports programs and athletes to survive, [NWCA] will be forced to seek additional hearings and remedial legislation." Letter from T.J. Kerr, President, NWCA, to Norma V. Cantú, Assistant Secretary for Civil Rights, Department of Education, at 5 (Oct. 20, 1995), *reprinted in* J.A. 164. Appellants contend that these letters constituted a petition for repeal or amendment of the Three-Part Test and that the 1996 Clarification effectively denied that petition without explanation.

Leaving aside any difficulties as to whether the Three-Part Test is the type of policy subject to the APA's petition requirements, NWCA's 1995 letters simply cannot be construed as a petition for repeal or amendment. The letters described problems NWCA perceived in the existing regulatory scheme under Title IX, but requested no particular action by the Department. We therefore agree with the Department that it was under no obligation to treat the letters as a valid petition. Indeed, the District Court noted that appellants subsequently filed a proper petition that remained pending before the Department when the District Court issued its decision, apparently conceding the infirmity of their previous correspondence. *See Nat'l Wrestling Coaches Ass'n*, 263 F.Supp.2d at 128.

Furthermore, the Department's 1995 solicitation for comments clearly confined its request to whether the proposed clarification of the Three-Part Test "provide[d] the appropriate clarity in areas that have generated questions." *See Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, at 1 (Sep. 20, 1995), *transmitted by* Letter from Norma V. Cantú, Assistant Secretary for Civil Rights,

Department of Education, *reprinted in* J.A. 131. And, as the 1996 Clarification reiterated, the Department did not intend the 1995-96 proceeding to serve as a forum for reconsideration of the Three-Part Test. *See* 1996 Clarification, J.A. 143. In light of the Department's broad discretion to manage its docket, *see Edison Elec. Inst. v. ICC*, 969 F.2d 1221, 1230 (D.C.Cir.1992), and the "quite limited" scope of our review of an agency's decision whether to repeal a rule, *see Nat'l Mining Ass'n v. United States Dep't of the Interior*, 70 F.3d 1345, 1352 (D.C.Cir.1995), it cannot be said that the Department failed to provide an adequate explanation for its disposition of NWCA's 1995 letters.

In sum, appellants did not petition for repeal or amendment of the Three-Part Test pursuant to the Department's solicitation of comments on its proposed clarification of the test. Nor would such a petition have been within the scope of the 1995-96 proceeding. The proceeding was undertaken by the Department solely to determine whether the proposed clarification of the Three-Part Test provided clarity in areas that had generated questions, not as a forum for reconsideration of the Three-Part Test. Appellants' subsequent petition for repeal or amendment of the Three-Part Test is still pending and thus is not ripe for review in this litigation.

III. CONCLUSION

We affirm on the merits the District Court's rejection of appellants' claim that the Department unlawfully denied their petition to amend or repeal the Three-Part Test. As to their remaining claims, we hold that appellants lack standing under Article III. Finally, even assuming, *arguendo*, that the requirements of Article III standing have been met,

appellants' case would be barred by the "adequate remedy" limitation of § 704 of the APA.

WILLIAMS, Senior Circuit Judge, dissenting:

The majority finds that plaintiffs do not have standing to maintain their suit. Because I believe our precedents require a different result, I dissent.

* * *

Plaintiffs consist of two types of associations--national associations of persons (including coaches) with interests in wrestling or other college sports, and associations of alumni, student athletes and others committed to advancing wrestling at specific universities (Bucknell, Marquette and Yale). Their complaint is that the defendant Department of Education has unlawfully enforced Title IX of the Education Amendments of 1972, 20 U.S.C. § § 1681-1688, in a way that has caused a reduction in opportunities for participation in men's sports, especially wrestling. They say that the Department has pressured colleges to achieve women's participation in sports proportional to women's enrollment, without regard to varying levels of interest or skill. As colleges have competing demands on their resources, cutting men's teams is one of the obvious ways for them to meet the Department's measure of proportionality. And cut they have. Plaintiffs cite a report by the General Accounting Office, "Intercollegiate Athletics: Four-Year Colleges' Experience Adding and Discontinuing Teams" (March 2001) ("GAO Report"), saying that schools had cut 519 men's teams between 1981-82 and 1998- 99, including 171 wrestling teams. GAO Report at 18. Of the 272 responding schools that had cut a men's team in the period 1992-93 to 1999-2000 (see *id.* at 33), 31% cited the need to meet gender equity goals or requirements. *Id.* In the face of these data, the district court found that plaintiffs had failed to allege facts showing any causal connection between the Department's actions and the reduction in plaintiffs' members' coaching opportunities, and thus found them without standing. This was error.

* * *

Plaintiffs point to two documents setting forth the Department's interpretation of Title IX: "Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics," 44 Fed.Reg. 71,413 (December 11, 1979) (codified at 45 C.F.R. pt. 86) (the "1979 Policy Interpretation"), and a statement issued by the Assistant Secretary for Civil Rights, "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (January 16, 1996) (the "1996 Clarification"). The 1979 Interpretation sets forth what has come to be known as the "Three-Part Test":

> a. Compliance will be assessed in any one of the following ways:
> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

1979 Interpretation, 44 Fed.Reg. at 71,418. At oral argument government counsel confirmed that, as the context suggests, "underrepresented" as used in paragraphs (2) and (3) means simply that women's sports participation fell below men's as a proportion of enrollment. Plaintiffs say that, especially with the 1996 Clarification, the Department has made the enrollment proportionality "prong" of the test into a "safe harbor" for compliance, see January 16, 1996 letter of Norma V. Cantú at 2 ("Cantú letter") (explaining 1996 Clarification), and has ruled that it will count "actual athletes"--not unfilled spots on teams--when it assesses the "proportionality of participation opportunities," *id.* at 4. See First Amended Complaint ¶ ¶ 44-45. The government at no point contends that the legal provisions that plaintiffs do *not* challenge--Title IX itself or the regulations antedating the 1979 Interpretation or the 1996 Clarification, i.e., the regulations adopted in 1975, 44 Fed.Reg. 24,128 (June 4, 1975) (now codified at 34 C.F.R. § 106.41(a) (2003))--either mandate proportionality by reference to enrollment or create a safe harbor based on such proportionality. (Such a claim would be a merits argument in any event.)

Incurring Departmental displeasure under the Interpretation and the Clarification is not something an educational institution would do lightly. The Department is empowered to cut off *all* federal funds from non-complying colleges and universities. See 20 U.S.C. § 1682 (authorizing each federal department and agency that extends federal financial assistance to any education program or activity to terminate funding in order to effectuate the provisions of Title IX); *id.* § 1687 (defining "program or activity" to include "all the operations of ... (2)(A) a college, university, or other postsecondary institution, or a public system of higher education"); 45 C.F.R. § 86.2(g) (defining federal financial assistance); see also 44 Fed.Reg. at 71,418-19 ("When a recipient is found in noncompliance and voluntary

compliance attempts are unsuccessful, the formal process leading to termination of Federal assistance will be begun."). That gives the Department substantial influence over college and university policies: federal support for postsecondary education totaled over $119 billion in 2000, well over 40% of the nearly $278 billion spent by all postsecondary institutions that year. See National Center for Education Statistics, Digest of Education Statistics 2002 at Tables 343-46 and 363.

Plaintiffs claim that in implementing the Interpretation and the Clarification the Department has "initiated hundreds of administrative enforcement actions and investigations" and "negotiated settlements with such institutions that reduced male participation opportunities." First Amended Complaint ¶ 48. "As a direct and indirect result of [the Department's] unlawful Title IX policies, therefore, institutions have cut (*i.e.*, eliminated) hundreds of men's teams and have capped (*i.e.*, arbitrarily limited) hundreds of men's participation opportunities." *Id.* They cite the GAO Report's finding in support. *Id.*

As the standing issue arose on a motion to dismiss, the plaintiffs' burden is simply to make the requisite *allegations*. "At the pleading stage, general factual allegations ... may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992) (citation omitted). See also *Bennett v. Spear*, 520 U.S. 154, 171, 117 S.Ct. 1154, 1165, 137 L.Ed.2d 281 (1997) (calling burden of allegation at the pleading stage "relatively modest"); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260- 61, 97 S.Ct. 555, 560-61, 50 L.Ed.2d 450 (1977); *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). Dismissal for want of subject matter jurisdiction should occur only if " 'it appears beyond doubt

that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 343 (D.C.Cir.2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45- 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)). Interestingly, the leading cases in our circuit finding standing on the basis of third parties' response to alleged excessive agency stringency, *Block v. Meese*, 793 F.2d 1303 (D.C.Cir.1986) (Scalia, J.), and *Tozzi v. United States Dep't of Health and Human Servs.*, 271 F.3d 301 (D.C.Cir.2001), discussed below in detail, involved motions for summary judgment; despite the far more demanding standard appropriate there, we found the requisite causality and redressability.

The plaintiffs are all associations, and there is no question (nor, so far as appears, any basis for questioning) that they meet the requirements for associational standing other than the disputed question of whether the members would have standing to sue in their own right. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 704, 145 L.Ed.2d 610 (2000) (requiring that the interest advanced be germane to association's purpose and that neither the claim nor the relief would need participation of individual members).

Two of the associations represent collegiate coaches. The National Wrestling Coaches Association represents collegiate wrestling coaches, and the College Sports Council represents national collegiate coaches associations for men's and women's swimming, men's and women's track and field, men's wrestling and men's gymnastics. First Amended Complaint ¶ ¶ 4, 8. The three college-specific associations represent alumni and student athletes and the complaint alleges that they have "participatory and spectator interests" in their respective schools' wrestling programs. Id. ¶ ¶ 5-7. With respect to Bucknell, the complaint alleges that the members of the association include "underclassmen on

Bucknell's 2001-02 wrestling team who want to wrestle for Bucknell in the 2002-03, 2003-04, and 2004-05 academic years." *Id.* ¶ 5; see also Second Amended Complaint ¶ 5 (naming a specific Bucknell wrestler). While the plaintiffs' allegations of redressability-- discussed below--may be insufficient as to the three college-specific associations, compare *Defenders of Wildlife,* 504 U.S. at 564-67, 112 S.Ct. at 2138-40, the suit may proceed if any plaintiff has standing, see, e.g., *Community for Creative Non-Violence v. Pierce,* 814 F.2d 663, 666 (D.C.Cir.1987), as I believe is true for the coaches seeking to advance their professional and economic interests.

Of the three familiar requirements for Article III standing--(1) a concrete, actual or imminent injury-in-fact, (2) causation and (3) redressability, see *Defenders of Wildlife,* 504 U.S. at 560-61, 112 S.Ct. at 2136-37--any dispute over "injury" appears to completely overlap the issue of causation. Thus the district court, though finding the complaint defective as to causation and redressability, also found that "it is conceivable that coaches in particular potentially suffer a direct economic harm through loss of employment if, as plaintiffs allege, the challenged regulations lead educational institutions to cut men's teams." *National Wrestling Coaches Ass'n v. United States Dep't of Educ.,* 263 F.Supp.2d 82, 106-07 (D.D.C.2003) ("*NWCA*"). The deprecatory phrase "it is conceivable" foreshadows the court's later decision on the two other requirements, to which I now turn.

Causation

In finding that the plaintiffs had not met their burden on causation, see *NWCA,* 263 F.Supp.2d at 112-14, the district court stressed that even in the absence of the Department's rules and enforcement policy an educational institution would have discretion to eliminate men's teams, *id.* at 112, 113. Because of the presence of other factors in the

institutions' decisionmaking--such as resource distribution, competitiveness, and spectator interest--the district court concluded that "it cannot be held ... that the Three Part Test and 1996 Clarification ... so *controls* [sic] the conduct of third parties as to confer standing on plaintiffs." *Id.* at 114 (emphasis added).

Despite use of the verb "control," the district court recognized that where an injury turns on a third party's response to government regulations, the law requires only that those regulations have constituted a "substantial factor" in the third party's decisionmaking. See *Community for Creative Non-Violence,* 814 F.2d at 669. See also *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.,* 901 F.2d 107, 113 (D.C.Cir.1990) (requiring "substantial likelihood of the alleged causality"). A factor can obviously play a substantial role without "control[ling]." Compare Maj. Op. at 943 (rejecting causality because "other factors" contributed to the schools' decisions).

The complaint clearly alleges that the Department regulations and policies represented a "substantial factor" in educational institutions' decisions on the number and composition of sports teams. Paragraph 48 of the First Amended Complaint says that either as a direct result of the Department's enforcement action or in order to avoid becoming the target of such action, educational institutions "have limited male participation opportunities to comply with [the Department's] unlawful Title IX policies," and that as a result of these policies institutions "have cut (*i.e.,* eliminated) hundreds of men's teams and have capped (*i.e.,* arbitrarily limited) hundreds of men's participation opportunities." The First Amended Complaint (¶ ¶ 50-52) also specifically alleges that wrestling teams at Bucknell, Marquette and Yale were eliminated in order to comply with the Department's Title IX policies.

This explicit allegation of the institutions' behavior and the Department's causal role is enough to reject the government's motion to dismiss under the principles laid out in the cases cited above--*Defenders of Wildlife, Warth v. Seldin* and *Empagran*. The majority's repeated insistence that the plaintiffs "demonstrate" the causal relation has no place in the inquiry. Compare Maj. Op. at 933, 942.

In fact, however, plaintiffs added more, offering the GAO Report as support. Summarizing extensive data gathering, it said that of 272 schools that cut a men's team, 83 (31%) cited the need to meet gender equity goals or requirements for their decision. GAO Report at 18. Among NCAA Division I-A schools, a clear majority (54%) cited gender equity considerations as a significant motivating factor in cutting a men's team. *Id.* at 20. The Report also lists changes in the number of men's teams between 1981-82 and 1998-99, including: 171 fewer wrestling teams, 56 fewer gymnastics teams, 27 fewer outdoor track teams and 25 fewer swimming teams. *Id.* at 13.

The majority notes that more men's teams were created than destroyed in the relevant period, see Maj. Op. at 942, erroneously suggesting that the relevant benchmark is the starting date. But the question is the effect of the Department's rules, so the proper benchmark is the expected growth of men's teams under a regime that did *not* demand enrollment proportionality. See *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 956 F.2d 321, 326-27 (D.C.Cir.1992).

That Bucknell and Marquette did not discard their wrestling teams until after the 1979 Interpretation had been in effect for "decades," see Maj. Op. at 939, proves little. The Department issued the 1996 Clarification to provide schools with "specific guidance about the [Department's] existing standards," and limited it to a discussion of the Three-Part

Test because questions about that test comprised a majority of those asked about Title IX compliance generally. See Cantú letter at 1. In fact, the rate of drops for male teams, as a proportion of all drops, visibly accelerated after the Clarification: In NCAA Division I, for example, male team drops were 61% of the total in the years 1988-89 to 1995-96, but grew to 76% in the years 1996-97 to 2001-02. NCAA Sponsorship and Participation Report (1982-2002) at 177. While it is true that the GAO Report does not define "gender equity considerations," Maj. Op. at 943, the timing is highly suggestive; in any event, plaintiffs explicitly *alleged* that the Department's interpretation of Title IX caused the cuts, see First Amended Complaint ¶ ¶ 48, 50-52, and that is all the law requires at the pleading stage.

Because plaintiffs' claim belongs to the class where an agency's alleged excess stringency is said to have substantially influenced third parties to make decisions injuring plaintiffs, the most obvious parallel cases are this court's decisions in *Block v. Meese* and *Tozzi v. United States Department of Health and Human Services*. In these cases the causal role was considerably less clear than here, yet we found standing.

In *Block* the Justice Department had classified three films distributed by the plaintiffs as "political propaganda" under the Foreign Agents Registration Act, a finding that required the plaintiffs to make public disclosure of the names of certain recipients and distributors of the films. 793 F.2d at 1307. Plaintiffs claimed that the publication of customers' names would affect their profits, and on cross-motions for summary judgment they submitted Block's affidavit saying that "[a]t least a dozen customers have specifically asked us not to reveal their names," and an affidavit of a library association saying that being listed as a purveyor of political propaganda "could cause problems for [the association] and its members." *Id.* at 1308. Although no

customer or potential customer submitted any statement that the prospect of publication had caused it to refrain from purchase or rental on account of the agency action, or that it would do so, we found standing.[1] We saw the government's conduct as "creat[ing] a disincentive" for plaintiffs' potential customers to acquire the films, damaging plaintiffs' profits. *Id.* Assuming that the disincentive worked through a "false impression," we said that that made no difference. *Id.* at 1309. None of the relevant third parties in *Block* actually *said* that it had changed its conduct because of the government's publication of customers' names.

Here we have 171 colleges or universities cutting men's wrestling teams and nearly 100 reporting that they cut men's teams for reasons of "gender equity." To be sure, they did not explicitly tell GAO that it was the Department's enforcement strategy that suddenly alerted them to the imperatives of gender equity. But plaintiffs allege such a link, and on a motion to dismiss that (rather plausible) allegation is enough.

In *Tozzi* the plaintiffs challenged an agency report that shifted the chemical dioxin from the category of substances "reasonably anticipated to be" human carcinogens to the category of ones "known" to be carcinogens. 271 F.3d at 303. As in *Block*, the government argued that, even if the plaintiffs were injured as a result of the change, the plaintiffs' injury was not fairly traceable to that decision. *Id.*

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[1] This was in contrast to the public classification of the film, with respect to which plaintiffs submitted a customer affidavit saying that but for the designation it would have purchased a specific film. *Block*, 793 F.2d at 1308.

at 308. The government pointed out that the anti-dioxin movement pre-dated the upgrade, and argued that pressure on companies to reduce the use of dioxin-containing products would continue whether or not dioxin continued to be listed as a known human carcinogen. *Id.*

Despite these arguments, we found sufficient causation, again on a motion for summary judgment. We noted that Congress had intended the report to serve as the federal government's authoritative statement on the state of carcinogen research; that Oakland, Berkeley and San Francisco passed anti-dioxin resolutions citing the agency's preliminary determination about dioxin; and that a member of the Board of Scientific Counselors noted that the report was a very important document. *Id.* at 309. On this basis we said we had "little doubt" "that the dioxin upgrade will represent a 'substantial factor' in the decisions of state and local agencies to regulate products containing dioxin or of healthcare companies to reduce or end purchases of [these products]." *Id.* "It is not too speculative to conclude that the Report will injure Brevet [a PVC-selling plaintiff] economically, even with the presence of other causal factors." *Id.*

Thus we found causation with little direct evidence. The strongest was perhaps the fact that three cities in the Bay area had referenced the Report in adopting anti-dioxin resolutions; but these were unaccompanied by any statement that any purchaser had heeded them, much less that the Report had "control[led]" those cities' recommendations or even been a major inducement to their issuance. We were quite explicit that third parties' consideration of other factors did not prevent a finding that the Report was likely to be a "substantial factor" in anti-dioxin decisions. *Id.*

In our recent decision in *Crete Carrier Corp. v. EPA*, 363 F.3d 490 (D.C.Cir.2004), we found no standing, but we emphasized the special conditions. Buyers of the tractors for tractor-trailers argued that a relatively stringent EPA engine emission standard--the 2004 Standard--would increase prices of such tractors. Under certain consent decrees, all significant manufacturers were bound until January 1, 2005 to produce engines meeting the 2004 Standard. We noted that but for the consent decrees, finding causation between enforcement of the 2004 Standard and increased prices for plaintiffs "would be the work of a minute." *Id.* at 493. Because of the consent decrees, however, any price relief for plaintiffs depended on the manufacturers' incurring the costs of reversing their production methods to meet standards less stringent than the 2004 Standard, even though they would have almost immediately have to retool *again* to meet still more stringent standards taking effect January 1, 2007. On summary judgment we found that plaintiffs had offered no evidence to support that scenario. *Id.* at 494. Plainly *Crete Carrier* does not undermine the lesson of *Block* and *Tozzi*.

In rejecting plaintiffs' claims as "purely speculative," the majority makes much of the Supreme Court's decisions in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), and *Warth v. Seldin*. But these cases in no way require that we hold plaintiffs' claim here to be too speculative; indeed, the opinions suggest that plaintiffs there lost more for want of proper pleading than for the theoretically speculative nature of their claims. In *Allen v. Wright*, for example, there was no talk of unduly speculative claims; rather, the plaintiffs simply failed to make the proper allegations. See 468 U.S. at 758, 104 S.Ct. at 3328 ("The diminished ability of respondents' children to receive a desegregated education

would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. Respondents have made no such allegation."). And in *Warth v. Seldin* the Court said, "Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed. We find the record devoid of the necessary allegations." 422 U.S. at 504, 95 S.Ct. at 2208 (citation omitted).

Similarly, in *Simon* the plaintiffs alleged only that an IRS Revenue Ruling had "encouraged" hospitals to deny service to indigents; it left implicit the corollary that plaintiffs' requested relief would "discourage" hospitals from denying service. 426 U.S. at 42, 96 S.Ct. 1917. Presumably, had the plaintiffs alleged a direct causal connection between the IRS Revenue Ruling, hospitals' decisionmaking and plaintiffs' access to hospitals, the Court would not have found plaintiffs' claims to be too speculative. Compare *Simon*, 426 U.S. at 42, 96 S.Ct. at 1926 ("[I]t does not follow from the allegation and its corollary that the denial of access to hospital services *in fact* results from petitioners' new Ruling" (emphasis added)), with First Amended Complaint ¶ 48 ("As a *direct* and indirect result of [the Department's] unlawful Title IX policies, therefore, institutions have cut (*i.e.*, eliminated) hundreds of men's teams" (emphasis added)). As this litigation progresses, the plaintiffs would obviously be obliged to produce evidence to substantiate their claims on summary judgment, and, as to controverted material issues, at trial. See, e.g., *Defenders of Wildlife*, 504

U.S. at 561, 112 S.Ct. at 2136; *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 997, 152 L.Ed.2d 1 (2002) (notice pleading standard relies on summary judgment motions to define disputed issues of fact and dispose of unmeritorious claims); *The Freedom Republicans, Inc. v. Federal Election Comm'n*, 13 F.3d 412, 418 (D.C.Cir.1994) (rejecting plaintiffs' claims as unduly speculative because plaintiffs had not produced enough evidence on summary judgment). Here the only question is whether the plaintiffs properly *pleaded* a causal connection between their injury and the Department's regulations, which they have. *Simon, Allen v. Wright* and *Warth v. Seldin* simply instruct the court to be cautious in making an inferential leap when plaintiffs have not offered specific allegations spelling out the requisite steps of the causal chain.

The majority seizes on a phrase of plaintiffs' counsel at oral argument--the view that relief would afford "better odds" for improved retention or restoration of men's teams, Maj. Op. at 939, 942, and deprecates "better odds" as insufficient or too speculative, *id.* at 937. And it observes that plaintiffs do not claim that any particular school "*necessarily* would forego elimination of a wrestling team ... in the absence of these interpretive rules." *Id.* at 939 (emphasis added). The implication--that what is not certain is too speculative--reflects a view of the law at odds with our tests. First, the language of counsel at oral argument is no basis for our evaluation of causal links. Second, under our "substantial factor" test, *Community for Creative Non-Violence*, 814 F.2d at 669, we require simply "substantial likelihood of the alleged causality." *Competitive Enter. Inst.*, 901 F.2d at 113. This is a probabilistic test, not susceptible of ready quantification, but plainly not requiring certainty.

Here plaintiffs' allegations indicate high probability. They directly allege that the Department's Title IX interpretations and its enforcement policies, including the

threat of withholding federal funds (meaning *all* forms of federal aid, no matter how unrelated to college athletics, see 20 U.S.C. § 1682), have caused educational institutions to cut men's athletic teams. Although the context is *not* summary judgment, they back it up with the highly suggestive data of the GAO Report. The strength of the causal inference seems at least as compelling as what we found sufficient in *Block* and *Tozzi* on summary judgment.

Redressability

Having found that plaintiffs sufficiently alleged a causal connection between their injury and the Department's regulations, it would be unusual to conclude that plaintiffs' injuries cannot be redressed by elimination of the illegal regulations. Both "inquiries require an assessment of how third parties will respond to the agency's action." *Community for Creative Non-Violence,* 814 F.2d at 670; see also *Allen v. Wright,* 468 U.S. at 753 n. 19, 104 S.Ct. at 3325 n. 19 ("To the extent there is a difference [between causation and redressability], it is that the former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested."). Even where, as here, the plaintiffs' requested remedy is a new rulemaking, see First Amended Complaint ¶ 99(B)(iii), we do not assess redressability on the basis of some finely calibrated estimate of what the new rule will be. "Where an agency rule causes the injury, the redressability requirement may be satisfied as well by vacating the challenged rule and giving the aggrieved party the opportunity to participate in a new rulemaking the results of which might be more favorable to it." *America's Cmty. Bankers v. FDIC,* 200 F.3d 822, 828-29 (D.C.Cir.2000); see also *Motor & Equip. Mfrs. Ass'n v. Nichols,* 142 F.3d 449, 458 (D.C.Cir.1998).

Plaintiffs' redressability pleadings are straightforward. They ask for an order remanding the current rules to the Department and requiring a rulemaking to amend them so that they will require institutions, to the extent that they make any gender-conscious decisions on athletic opportunities, "to use interest and ability--not enrollment--as the relevant population." First Amended Complaint ¶ 99(A)(iii), (B)(iii). They explicitly allege that grant of the relief requested "will redress the injuries alleged herein." *Id.* ¶ 53. Given the allegation that the Department's actions were the cause of the injury, it follows logically that removal of that cause would supply redress.

The government's arguments add nothing to what is already implicit in the discussion of causation. Indeed, it seems to misunderstand what is required of plaintiffs here, arguing that the plaintiffs must show that different Department regulations would cause a school that has eliminated a team to reinstitute that team. Appellee's Brief at 24. While such an allegation may be necessary for the three college-specific associations to maintain their claims,[2] the

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[2] Although the plaintiffs submitted a press release directly linking the elimination of Bucknell's wrestling team to the Department's Title IX policies and regulations, see Bucknell News Release (May 2, 2001) (stating that Bucknell cut men's wrestling team to attempt to "keep [ ] women represented in its varsity programs to the same degree they are represented in the student body"), nowhere in the complaint did they allege that a change in the regulations would cause Bucknell, Marquette or Yale either to rethink cuts already made or to redress in some other way the injuries suffered by student athletes and alumni at those schools. Thus, as to the college-specific associations, it appears

(Footnote cont'd on next page)

other plaintiff associations need neither to demonstrate nor even allege such a direct result. They have plainly alleged that the alleged wrongdoing is ongoing and continues to affect educational institutions' decisionmaking. See First Amended Complaint ¶ 48 (the Department's "unlawful Title IX policies directly and indirectly have reduced (and continue to limit) participation opportunities for male athletes."). Under these circumstances, the redressability requirement is satisfied if there can be "a sanction that effectively abates that conduct and prevents its recurrence." *Laidlaw*, 528 U.S. at 185-86, 120 S.Ct. at 706.

Similarly, the government faults the plaintiffs for failing to allege that any member coaches are employed by educational institutions that "have declared any intention now or in the future to initiate the cutting or capping of athletic teams," Appellee's Brief at 24, and it suggests that the plaintiffs' complaint should have listed the schools at which their members coach, *id.* at 24-25. But under "notice pleading," a court on a motion to dismiss must "presume[e] that general allegations embrace those specific facts that are necessary to support the claim." *Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct. at 2137 (alteration in original); see also Rule 8(a)(2), Fed. R. Civ. Pro.; *Swierkiewicz*, 534 U.S. at 512, 122 S.Ct. at 997; *Bennett*, 520 U.S. at 168, 117 S.Ct. at 1163 ("Given petitioners' allegation ... it is easy to presume specific facts under which petitioners will be injured"). Given that the

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(Footnote cont'd from previous page.)

that this may be the rare circumstance where the allegations are sufficient to establish causation but not redressability.

plaintiffs have alleged both that they are national organizations representing coaches in a number of men's sports, see First Amended Complaint ¶ ¶ 4, 8, and that they are suffering *ongoing* injury due to the Department's regulations, *id.* ¶ 48, we must infer that these allegations embrace the specific facts necessary to support plaintiffs' claims, i.e., that plaintiffs' member coaches are employed by educational institutions that would, in the event of a Department retreat, be either substantially *less* likely to cut or cap men's teams in the future to comply with the Department's Title IX regulations and policies, or substantially *more* likely to support increases in men's sports opportunities. The proper comparison, of course, is between men's sports opportunities under the current regime and men's sports opportunities under a future regime in which the Department's enrollment proportionality requirement has been removed. See *Competitive Enter. Inst. v. National Highway Traffic Safety Admin.*, 956 F.2d at 326-27. It is of no consequence that the Department has no obligation to proceed in the future by rulemaking, compare Maj. Op. at 940, so long as it is *substantively% I barred from pursuit of enrollment proportionality, in disregard of varying levels of interest and skill.*

* * *

As an alternative holding, the majority finds the plaintiffs' suit unreviewable under the Administrative Procedure Act, 5 U.S.C. § § 701-706, because it believes the plaintiffs may achieve an adequate remedy by suing individual colleges and universities directly. See generally *id.* § 704 (limiting judicial review to "final agency action for which there is no other adequate remedy in a court"). I believe the majority's reasoning is mistaken here as well.

As the Supreme Court explained in *Bowen v. Massachusetts*, § 704 is to be read narrowly so as not "to defeat the central purpose of providing a broad spectrum of

judicial review of agency action." 487 U.S. 879, 903-04, 108 S.Ct. 2722, 2737, 101 L.Ed.2d 749 (1988); see also *Esch v. Yeutter*, 876 F.2d 976, 982 (D.C.Cir.1989). The adequate remedy question is a practical one: would the alternative remedy afford the same relief to plaintiffs as suit under the APA? See, e.g., *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C.Cir.1990) (looking at statutory remedies available to plaintiff in judging question of adequacy); *Council of and for the Blind v. Regan*, 709 F.2d 1521, 1532 (D.C.Cir.1983) (comparing remedies available under APA and the Revenue Sharing Act).

In this case, the remedy sought by plaintiffs is a new rulemaking by the Department of Education, First Amended Complaint ¶ 99(B)(iii), one that would eliminate enrollment proportionality as a "safe harbor" for compliance with Title IX, *id.* ¶ 99(A)(iii). The plaintiffs also seek to prohibit the Department from "requiring or authorizing institutions to engage in gender-conscious cutting or capping to meet a disparate-impact standard." *Id.* ¶ 99(A)(ii). Although the plaintiffs may sue individual institutions directly to redress discrimination proscribed by Title IX, see *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), such a suit would not achieve plaintiffs' desired remedies. Government coercion may be illegal even though the induced third-party action is itself legal. Just as in *Tozzi* and *Block* the allegation was that illegal government stigmatization would induce third parties to avoid products that they were clearly free to avoid on their own (dioxin-containing products in one case, specific films in the other), here government pressure toward enrollment-based "gender equity" may be illegal but private parties' pursuit of such gender equity perfectly legal. Cf. *United Steelworkers v. Weber*, 443 U.S. 193, 201, 99 S.Ct. 2721, 2726, 61 L.Ed.2d 480 (1979) (allowing private parties to adopt an affirmative action plan containing racial preferences that the Court

assumed the government could not lawfully have required). Because individual suits against educational institutions would not provide plaintiffs with an adequate remedy for their injury, § 704 cannot provide a basis for finding plaintiffs' claims unreviewable.

* * *

For the foregoing reasons I would reverse the district court.

United States Court of Appeals for the
District of Columbia Circuit.

National Wrestling Coaches Association, Committee to Save Bucknell Wrestling, Marquette Wrestling Club, Yale Wrestling Association, and College Sports Council,

Appellants,

v.

Department of Education,

Appellee.

No. 03-5169
Filed Oct. 8, 2004

Before: EDWARDS and HENDERSON, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

ORDER

On Petition for Rehearing.

Upon consideration of appellants' petition for rehearing, it is

ORDERED that the petition be denied.

A PER CURIAM statement is attached.

A statement of Senior Circuit Judge WILLIAMS dissenting from the denial of rehearing is also attached.

Before: GINSBURG, Chief Judge, EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, GARLAND, ROBERTS, Circuit Judges.

ORDER

On Petition for Rehearing *En Banc*.

Appellants' petition for rehearing *en banc* and the response thereto have been circulated to the full court. The

taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Circuit Judge TATEL did not participate in this matter.

Chief Judge GINSBURG would grant rehearing en banc for the reasons stated in Senior Circuit Judge WILLIAMS's dissent from the denial of rehearing.

PER CURIAM.

Appellants have petitioned for rehearing and rehearing *en banc*. On the record at hand, there is no reason for the panel to revisit this case and there is no valid basis justifying *en banc* consideration of this matter. We offer this brief statement merely to respond to an argument raised in the dissenting statement.

As an initial matter, we note that appellants have offered nothing but unadorned speculation to support their claim that a favorable decision from this court would redress their alleged injuries. The Supreme Court has made it clear that plaintiffs cannot rely on such speculation to satisfy the redressability prong of standing. The opinion for the court in this case invokes this well-established principle of law. *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 936-40 (D.C.Cir.2004).

The opinion for the court also makes it clear that, even if appellants had standing to pursue their claims in this case, the availability of a private cause of action directly against universities bars this lawsuit against the agency. *Id.* at 945-46. The court's decision in *Washington Legal Foundation v. Alexander*, 984 F.2d 483 (D.C.Cir.1993), is controlling on this point, and appellants have never been able to clear the hurdle of this precedent.

The dissent's attempt to distinguish *Washington Legal Foundation* is perplexing. The dissent argues that *Washington Legal Foundation* can be distinguished, on the ground that *Washington Legal Foundation* involved only claims of statutory violations, "whereas here plaintiffs allege Constitutional violations of which the private educational institutions could not possibly be guilty." The problem with this argument is that it is premised on the faulty assumption that a plaintiff may avoid the dictates of *Washington Legal Foundation* merely by reciting constitutional provisions that

obviously do not reflect the gist of the complaint. This is an untenable proposition, as this case demonstrates.

The heart of appellants' claim in this case is that universities have taken actions that violate Title IX and Title IX's implementing regulations. It is clear beyond dispute that appellants' asserted injuries arise solely from the universities' actions allegedly taken in derogation of Title IX. Indeed, the "constitutional violations" allegedly committed by public educational institutions involve no substantive claims beyond those that would otherwise be cognizable under Title IX.

As the dissent concedes, appellants have consistently maintained that, in subscribing to Department of Education enforcement policy interpretations, the universities have themselves adopted unlawful policies and engaged in unlawful activities. *See, e.g.*, Appellants' Br. at 8 ("When a school cuts or caps a team solely to comply with gender proportionality, it discriminates in violation of Title IX, 29 U.S.C. § 1681(a), the Title IX regulations, 34 C.F.R. § 106.41(a), and (for public schools) the Equal Protection Clause of the Fourteenth Amendment."). In short, appellants have argued throughout this litigation that, in adhering to the Department's enforcement policy interpretations, the universities have engaged in intentional discrimination that Title IX prohibits. This being the case, *Washington Legal Foundation* is obviously controlling, because appellants have a private cause of action directly against the universities to seek redress for any proscribed acts of sex discrimination committed by the universities. Appellants' action against the agency is therefore barred under 5 U.S.C. § 704 (2000).

The dissent ignores the fact that the Department's enforcement policy interpretations are not binding regulations. They do not carry the force of law, and universities are not bound to follow the policy interpretations. Therefore, the mere existence of the

Department's policy interpretations causes appellants no cognizable injury. Appellants are only injured when, as they allege, the universities take actions that violate Title IX and Title IX's implementing regulations. There are no viable constitutional claims beyond these alleged statutory injuries. Thus, appellants have a fully adequate private cause of action directly against the universities to seek redress for their alleged injuries.

Finally, this case surely cannot be distinguished from *Washington Legal Foundation*, as the dissent argues, on the ground that the agency here "is charged with bullying [the educational] institutions into adopting unlawful practices." The only thing the Department has done here is issue nonbinding enforcement policy interpretations, which is hardly evidence of "bullying." But even if the Department might be seen as a bully, this does not change the fact that appellants still have a private cause of action against the universities for any acts that the educational institutions take in violation of Title IX and Title IX's implementing regulations.

WILLIAMS, Senior Circuit Judge, dissenting from the denial of rehearing:

The panel found that the plaintiffs inadequately alleged the causal connection between the Department's actions and their injuries and the likelihood that judicial action could redress the injuries. It further argued that the plaintiffs have an adequate remedy against the colleges and universities that actually terminated men's sports teams, and that under our precedents the existence of this supposed remedy negates any remedy against the Department under the Administrative Procedure Act. 366 F.3d at 933-49. I discuss all three contentions in my dissent. 366 F.3d at 949- 59. A few further points may be helpful.

1. *Causation.* In addressing the standing of plaintiffs who claimed to have been injured by a government agency's imposition of more stringent standards on third parties than were lawful, we have on four occasions ruled explicitly that they would meet the causation criterion if they could show that the agency's allegedly illicit action was a "substantial factor" in bringing about the injurious conduct of the third parties. *Tozzi v. United States Dep't of Health and Human Servs.*, 271 F.3d 301, 308 (D.C.Cir.2001); *Competitive Enterprise Inst. v. National Highway Traffic Safety Admin.*, 956 F.2d 321, 323 (D.C.Cir.1992); *Competitive Enterprise Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 114 (D.C.Cir.1990); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 669 (D.C.Cir.1987). In two we have implicitly applied that standard. *Crete Carrier Corp. v. EPA*, 363 F.3d 490, 493 (D.C.Cir.2004) (plaintiffs must show that it was "substantially probable" that the challenged standard was "responsible" for the price increase injuring plaintiffs); *Block v. Meese*, 793 F.2d 1303, 1308-09 (D.C.Cir.1986) (finding plaintiffs have alleged a sufficient injury because government report "creates a disincentive" for third parties to obtain films from plaintiffs). Here the court failed to even

acknowledge the circuit's principle, much less follow it in substance. This failure is all the more acute because this case was resolved on the pleadings, so that only an *allegation* of causation was necessary. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Indeed, much of the court's language--let alone its factual analysis--makes plain that it was not following a "substantial factor" test. See Maj. Op., 366 F.3d at 939 ("As the Department emphasized when issuing its 1996 clarification, nothing in the Three-Part Test *requires* schools to eliminate or cap men's wrestling or any other athletic program.") (emphasis added); *id.* at 940 ("Moreover, other reasons unrelated to the challenged legal requirements *may* continue to motivate schools....") (emphasis added); *id.* at 943 ("Finally, the GAO also found that several other factors also contributed to schools' decisions as much or more than 'gender equity considerations'....").

The present decision appears to be a random exception to circuit precedent. The Supreme Court has never explicitly approved or rejected our "substantial factor" test, but under our standard principles we should apply that test unless or until the Court tells us otherwise. *LaShawn v. Barry,* 87 F.3d 1389, 1393-97 (D.C.Cir.1996) (en banc).

2. *Redressability.* The majority thought that redressability was lacking in large part because, even if the 1996 Clarification were found invalid, Title IX and the 1975 regulations would continue to apply. See Maj. Op., 366 F.3d at 944. But the 1996 Clarification wrought a material change in the pre-existing regulatory condition. It created three safe harbors for colleges and universities, of which the clearest was achieving strict proportionality between men's and women's enrollment and their team sport participation, without regard to interest or skill. See 366 F.3d at 950 (discussing mention of such a "safe harbor" in letter from the Department). No such safe harbor existed before the 1996 Clarification. Neither the statute nor the formal regulations

said anything about strict proportionality of this sort. They may well have allowed it (that issue in part involves the merits), but they did not express either a congressional or departmental view that achieving such proportionality would win a college or university a legal pass. For colleges and universities interested in keeping their federal funding and avoiding costly litigation (and how many would not be!), the Clarification thus created strong pressure to achieve proportionality. Among the actions that would move a college or university toward proportionality, dropping men's teams was a relatively cheap device. Unsurprisingly, colleges and universities responded to the pressure by including such drops as part of their solutions-- or so at any rate plaintiffs quite credibly allege.

Redressability follows logically. If the 1996 Clarification was a substantial factor in leading colleges and universities to discard teams, its deletion can be expected to cause many to restore teams. A probabilistic benefit is adequate to support standing. "Redressability examines whether the relief sought ... will *likely alleviate* the particularized injury alleged by the plaintiff." *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663-64 (D.C.Cir.1996) (en banc) (emphasis added). See also, e.g., *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (requiring "substantial likelihood" that relief will remedy injury). It would be a novel principle of administrative law that persons disadvantaged by a new, stringent interpretation of a regulation could not challenge it just because the underlying regulation would remain in place once the challenged interpretation was held unlawful.

3. *Alternative remedy.* In *Washington Legal Foundation v. Alexander*, 984 F.2d 483 (D.C.Cir.1993) ("*WLF*"), plaintiffs sued the Department of Education, alleging that it had failed "to issue and enforce" regulations withdrawing federal funds from colleges and universities that were, according to the complaint, violating Title VI in their administration of

race-based scholarship programs. *Id.* at 485. We affirmed the district court's dismissal on the basis of the APA's limitation of judicial review to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. We reasoned that this barred a suit against the Department because a person suffering discrimination by a college or university in violation of Title VI had an adequate alternative remedy--a right of action under Title VI against the discriminating institution itself. See *WLF*, 984 F.2d at 485.

In my initial dissent I reasoned that *WLF* could not apply to the extent that the educational institutions' conduct here was perfectly legal-- though induced by Department action that the plaintiffs said was illegal. 366 F.3d at 958-59. Plaintiffs, however, consistently allege that the educational institutions' acts are also illegal; given that argument, my prior reasoning appears largely inapplicable. Nonetheless, it remains the case that *WLF* by no means bars this suit.

First, *WLF* involved only claims of statutory violations, whereas here plaintiffs allege Constitutional violations of which the private educational institutions could not possibly be guilty. See Appellants' Br. at 8 ("USDE's Title IX policies restrict, abrogate, or dilute Equal-Protection rights") (internal quotation marks omitted); Am. Compl. ¶ 3, *reprinted in* Joint Appendix 12 ("Plaintiffs seek declaratory and injunctive relief to compel USDE to comply with the Equal Protection component of the Due Process Clause, U.S. CONST. amend. V."). As the private universities and colleges do not have the capacity to violate the Constitution, claims of such violations can run only against the Department (and/or state colleges and universities), and there is no remedy against the private institutions at all, much less an adequate one.

More important, in *WLF* and kindred cases the agency was accused only of failing to *stop or penalize* illegal behavior by educational institutions. Here, by contrast, the agency is charged with bullying those institutions into adopting unlawful practices.

In *WLF*, the Department of Education was alleged to have either refused to enforce an existing policy against race-based minority scholarships or abdicated its responsibility to enforce Title VI by failing to generate a policy prohibiting such scholarships. 984 F.2d at 486. It was the preexisting independent behavior of colleges and universities--operating the minority scholarship programs in such a way as to violate Title VI--that caused the alleged injuries. In this setting, we held that a suit directly against the universities was an adequate alternative remedy, barring the suit against the agency. *Id.* at 486. Exactly the same relationship--mere agency failure to stop or penalize illegal behavior by others--appears to characterize *all* our decisions in the *WLF* line. *Godwin v. Sec'y of Housing and Urban Development,* 356 F.3d 310, 311-12 (D.C.Cir.2004) (per curiam); *Women's Equity Action League v. Cavazos,* 906 F.2d 742, 744-45, 751 (D.C.Cir.1990); *Coker v. Sullivan,* 902 F.2d 84, 85, 89-90 (D.C.Cir.1990); *Council of and for the Blind of Delaware County Valley, Inc. v. Regan,* 709 F.2d 1521, 1531-32 (D.C.Cir.1983) (en banc). And the same appears to be true for out-of-circuit precedents that take a *WLF* approach. See *Jersey Heights Neighborhood Ass'n v. Glendening,* 174 F.3d 180, 191-92 (4th Cir.1999); *New York City Employees' Retirement System v. SEC,* 45 F.3d 7, 14 (2d Cir.1995).

Whereas it is quite logical to have plaintiffs obtain relief through actions directly against wrongdoers when the agency's only role is neglect, it makes little sense to extend *WLF* to a context where the agency itself is, as alleged here,

the driving force behind the illegality. In effect, the majority ruling here would have the courts scotch the snake, not kill it.

5 U.S.C. § 551(4)-(6), (13), Definitions

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

5 U.S.C. § 553, Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the ruie is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 702, Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 703, Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may

be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704, Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

20 U.S.C. § 1681 (a)-(b), Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, . . .

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one

sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

20 U.S.C. § 1682, Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President . . .

20 U.S.C. § 1683, Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial

assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

45 C.F.R. §86.41(a)-(c)(1), Athletics [cf. 34 C.F.R. § 106.41(a)-(c)(1) (same)]

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; . . .

Federal Register, Vol. 44, No. 239, Tuesday, December 11, 1979, Rules and Regulations (44 Fed. Reg. 71,413)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 86

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW.

ACTION: Policy interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits

EFFECTIVE DATE: December 11, 1979

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SUPPLEMENTARY INFORMATION:

1. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 844 of the Education Amendments of 1974 further provides:

The Secretary of [of HEW] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a

law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.[]

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

- Compliance in Financial Assistance (Scholarships) Based on Athletic Ability: Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.
- Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem, coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.

- Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- "Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and
- Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or

- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

(1) Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilitate an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an

institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of stating actual compliance factors would be more useful to all concerned.

(3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditure patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

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VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity

requirements of the regulation which are set forth at 45 CFR 88.37(c) and 88.4a(c).

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C. Effective Accommodation of Student Interests and Abilities.

1. The Regulation. The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at ' 86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are availableC

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. The Policy. The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

a. The determination of athletic interests and abilities of students;

b. The selection of sports offered; and

c. The levels of competition available including the opportunity for team competition.

3. Application of the Policy C Determination of Athletic Interests and Abilities.

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. Application of the Policy - Selection of Sports.

In the selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

a. Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

b. Non-Contact Sports - Effective accommodation means that if an institution sponsors a team for members of one sex

in a non-contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited;

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. Application of the Policy - Levels of Competition.

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot

show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. Overall Determination of Compliance.

The Department will base its compliance determination under ' 86.41(c) of the regulation upon a determination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded

male and female athletes exist in the institution's program as a whole; or

c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

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IX. Authority

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374, 20 U.S.C. 1681, 1682; sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612; and 45 CFR Part 86)

Dated December 3, 1979.

Roma Stewart,

Director, Office for Civil Rights, Department of Health, Education, and Welfare.

Dated December 4, 1979.

Patricia Roberts Harris,

Secretary, Department of Health, Education, and Welfare.

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

<seal> THE ASSISTANT SECRETARY

Jan 16, 1996

Dear Colleague:

It is my pleasure to send you the enclosed Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the Clarification).

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979--both of which followed publication for notice and the receipt, review and consideration of extensive comments--specifically address intercollegiate athletics. Since becoming Assistant Secretary, I have recognized the need to provide additional clarification regarding what is commonly referred to as the "three-part test," a test used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics. The three-part test is described in the Department's 1979 Policy Interpretation.

Accordingly, on September 20, 1995, OCR circulated to over 4500 interested parties a draft of the proposed Clarification, soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX. As indicated when circulating the draft of the Clarification, the objective of the Clarification is to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics. Further, the Clarification is limited to an elaboration of the

"three-part test." This test, which has generated the majority of the questions that have been raised about Title IX compliance, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation.

OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

The draft has been revised to incorporate suggestions that OCR received regarding how to make the document more useful and clearer. For instance, the Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term "developing interests" under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities and why Title IX does not require an institution, under part three of the test, to accommodate the interests and abilities of potential students.

OCR also received requests for clarification that relate primarily to fact- or institution-specific situations that only apply to a small number of athletes or institutions. These comments are more appropriately handled on an individual basis and, accordingly, OCR will follow-up on these comments and questions in the context of OCR's ongoing technical assistance efforts.

It is important to outline several points about the final document.

The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes. The first part of the test--substantial proportionality--focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The second part--history and continuing practice--is an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part--fully and effectively accommodating interests and abilities of the underrepresented sex--centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the

same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways to comply. Opponents of the test assert, therefore, that the test improperly establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title IX because it measures gender discrimination by underrepresentation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

First, it is clear from the Clarification that there are three different avenues of compliance. Institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated. The fact that each part of the three-part test considers participation rates does not mean, as some opponents of the test have

suggested, that the three parts do not provide different ways to comply with Title IX.

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting institutions--notwithstanding the long history of discrimination based on sex in athletics programs--to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.)

OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

What is clear then--because, for example, part three of the three-part test permits evidence that underrepresentation is caused not by discrimination but by lack of interest--is that underrepresentation alone is not the measure of discrimination. Substantial proportionality merely provides institutions with a safe harbor. Even if this were not the case and proportional opportunities were the only test, the "quota" criticism would be misplaced. Quotas

are impermissible where opportunities are required to be created without regard to sex. However, schools are permitted to create athletic participation opportunities based on sex. Where they do so unequally, that is a legitimate measure of unequal opportunity under Title IX. OCR has chosen to make substantial proportionality only one of three alternative measures.

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.

OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex. Ultimately, Title IX provides institutions with flexibility and choice regarding

how they will provide nondiscriminatory participation opportunities.

Finally, several parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however, that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a significant challenge that many institutions face today, especially in the face of increasing budget constraints. It has been OCR's experience, however, that institutions committed to maintaining their men's program have been able to do so--and comply with Title IX--notwithstanding limited athletic budgets. In many cases, OCR and these institutions have worked together to find creative solutions that ensured equal opportunities in intercollegiate athletics. OCR is similarly prepared to join with other institutions in assisting them to address their own situations.

OCR is committed to continuing to work in partnership with colleges and universities to ensure that the promise of Title IX becomes a reality for all students. Thank you for your continuing interest in this subject.

Sincerely, <signed>
Norma V. Cantú, Assistant Secretary for Civil Rights

Jan 16, 1996

CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX), which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, at 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 Fed. Reg. 71413 et seq. (1979)).[1]

The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

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[1] The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation. See 44 Fed. Reg. 71413.

The 1979 Policy Interpretation provides that as part of this determination OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. 44 Fed. Reg. at 71418.

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement. It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in

order to determine whether an institution effectively accommodates the interests and abilities of its students. In addition, when an "overall determination of compliance" is made by OCR, 44 Fed. Reg. 71417, 71418, OCR examines the institution's program as a whole. Thus OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

This Clarification provides specific factors that guide an analysis of each part of the three-part test. In addition, it provides examples to demonstrate, in concrete terms, how these factors will be considered. These examples are intended to be illustrative, and the conclusions drawn in each example are based solely on the facts included in the example.

THREE-PART TEST -- Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program. The Policy Interpretation defines participants as those athletes:

Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

Who are listed on the eligibility or squad lists maintained for each sport, or

Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

44 Fed. Reg. at 71415.

OCR uses this definition of participant to determine the number of participation opportunities provided by an institution for purposes of the three-part test.

Under this definition, OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates. In determining participation opportunities, OCR includes, among others, those athletes who do not receive

scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete. OCR's investigations reveal that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team. Because these are significant benefits, and because receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

OCR's analysis next determines whether athletic opportunities are substantially proportionate. The Title IX regulation allows institutions to operate separate athletic programs for men and women. Accordingly, the regulation allows an institution to control the respective number of participation opportunities offered to men and women. Thus, it could be argued that to satisfy part one there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment.

However, because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality--for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality--the Policy Interpretation examines whether participation opportunities are "substantially" proportionate

to enrollment rates. Because this determination depends on the institution's specific circumstances and the size of its athletic program, OCR makes this determination on a case-by-case basis, rather than through use of a statistical test.
As an example of a determination under part one: If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.
As another example, over the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal--i.e., 50 percent of the participants in its athletic program are female--its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy part one.
OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this

situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.

As another example, at Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

THREE-PART TEST -- Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under part two of the three-part test (part two), an institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the

underrepresented sex. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.[2]

OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. Developing interests include interests that already exist at the institution.[3] There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the

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[2] Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX.

[3] However, under this part of the test an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex. Moreover, under part two an institution has flexibility in choosing which teams it adds for the underrepresented sex, as long as it can show overall a history and continuing practice of program expansion for members of that sex.

institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.

OCR will consider the following factors, among others, as evidence that may indicate a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

OCR will consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion. It is only necessary to examine part two if one sex is overrepresented in the athletic program. Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion for that sex.

In addition, OCR will not find that an institution satisfies part two where it established teams for the underrepresented sex only at the initiation of its program for the underrepresented sex or where it merely promises to expand its program for the underrepresented sex at some time in the future.

The following examples are intended to illustrate the principles discussed above.

At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and

coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.
By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.
In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and

1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

THREE-PART TEST -- Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex -- including students who are admitted to the institution though not yet enrolled. Title IX provides that at recipient must provide equal athletic opportunity to its students. Accordingly, the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students.[4]

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these

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[4] However, OCR does examine an institution's recruitment practices under another part of the Policy Interpretation. See 44 Fed. Reg. 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit potential student athletes.

students are, in fact, being fully and effectively accommodated.

In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

a) Is there sufficient unmet interest to support an intercollegiate team?

OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and

- participation in particular in interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).[5] For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. See 44 Fed. Reg. at 71417. These assessments may use

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[5] While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.

straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.
An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

b) Is there sufficient ability to sustain an intercollegiate team?
Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:
the athletic experience and accomplishments--in interscholastic, club or intramural competition--of students and admitted students interested in playing the sport;
opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

c) Is there a reasonable expectation of competition for the team?

Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

competitive opportunities offered by other schools against which the institution competes; and

competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

Under the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.

CONCLUSION

This discussion clarifies that institutions have three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities. The three-part test gives institutions flexibility and control over their athletics programs. For instance, the test allows institutions to respond to different levels of interest by its male and female students. Moreover, nothing in the three-part test

requires an institution to eliminate participation opportunities for men.

At the same time, this flexibility must be used by institutions consistent with Title IX's requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing nondiscriminatory participation opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

<seal>

THE ASSISTANT SECRETARY

July 11, 2003

Dear Colleague:

It is my pleasure to provide you with this Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.

Since its enactment in 1972, Title IX has produced significant advancement in athletic opportunities for women and girls across the nation. Recognizing that more remains to be done, the Bush Administration is firmly committed to building on this legacy and continuing the progress that Title IX has brought toward true equality of opportunity for male and female student-athletes in America.

In response to numerous requests for additional guidance on the Department of Education's (Department) enforcement standards since its last written guidance on Title IX in 1996, the Department' s Office for Civil Rights (OCR) began looking into whether additional guidance on Title IX requirements regarding intercollegiate athletics was needed. On June 27, 2002, Secretary of Education Rod Paige created the Secretary's Commission on Opportunities in Athletics to investigate this matter further, and to report back with recommendations on how to improve the application of the current standards for measuring equal opportunity to participate in athletics under Title IX. On February 26, 2003, the Commission presented Secretary Paige with its final report, "Open to All: Title IX at Thirty," and in addition, individual members expressed their views.

After eight months of discussion and an extensive and inclusive fact-finding process, the Commission found very

broad support throughout the country for the goals and spirit of Title IX. With that in mind, OCR today issues this Further Clarification in order to strengthen Title IX's promise of non-discrimination in the athletic programs of our nation's schools.

Title IX establishes that: "No person in the United States shall, on the basis of sex, be

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

In its 1979 Policy Interpretation, the Department established a three-prong test for compliance with Title IX, which it later amplified and clarified in its 1996 Clarification. The test provides that an institution is in compliance if 1) the intercollegiate- level participation opportunities for male and female students at the institution are "substantially proportionate" to their respective full- time undergraduate enrollments, 2) the institution has a "history and continuing practice of program expansion" for the underrepresented sex, or 3) the institution is "fully and effectively" accommodating the interests and abilities of the underrepresented sex.

First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. All three prongs have been used successfully by schools to comply with Title IX, and the test offers three separate ways of assessing whether schools are providing equal opportunities to their male and female students to participate in athletics. If a school does not satisfy the "substantial proportionality" prong, it would still satisfy the three-prong test if it maintains a history and continuing practice of program expansion for the underrepresented sex, or if "the interests and abilities of the

members of [the underrepresented] sex have been fully and effectively accommodated by the present program." Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.

The transmittal letter accompanying the 1996 Clarification issued by the Department described only one of these three separate prongs - substantial proportionality - as a "safe harbor" for Title IX compliance. This led many schools to believe, erroneously, that they must take measures to ensure strict proportionality between the sexes. In fact, each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. The Department will continue to make clear, as it did in its 1996 Clarification, that "[i]nstitutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas."

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law, to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.

In the 1996 Clarification, the Department provided schools with a broad range of specific factors, as well as illustrative examples, to help schools understand the flexibility of the three-prong test. OCR reincorporates those factors, as well as those illustrative examples, into this Further Clarification, and OCR will continue to assist schools on a case-by-case basis and address any questions they have about Title IX compliance. Indeed, OCR encourages schools to request individualized assistance

from OCR as they consider ways to meet the requirements of Title IX. As OCR works with schools on Title IX compliance, OCR will share information on successful approaches with the broader scholastic community.

Second, OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams.

Therefore, in negotiating compliance agreements, OCR's policy will be to seek remedies that do not involve the elimination of teams.

Third, OCR hereby advises schools that it will aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. At the same time, OCR will also work with schools to assist them in avoiding such sanctions by achieving Title IX compliance.

Fourth, private sponsorship of athletic teams will continue to be allowed. Of course, private sponsorship does not in any way change or diminish a school's obligations under Title IX.

Finally, OCR recognizes that schools will benefit from clear and consistent implementation of Title IX. Accordingly, OCR will ensure that its enforcement practices do not vary from region to region.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a challenge for many academic institutions.

But OCR believes that the three-prong test has provided, and will continue to provide, schools with the flexibility to provide greater athletic opportunities for students of both sexes.

OCR is strongly reaffirming today its commitment to equal opportunity for girls and boys, women and men. To that end, OCR is committed to continuing to work in partnership with educational institutions to ensure that the promise of Title IX becomes a reality for all students.

Thank you for your continuing interest in this subject.

Sincerely,

Gerald Reynolds

Assistant Secretary for Civil Rights

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

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Sally Ann Cummings 5/17/04
Chief, Civilian Records
National Archives at College Park
8601 Adelphi Rd.
College Park, MD 20740

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
THE OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

<seal>
THE GENERAL COUNSEL

MAR 20, 1979

MEMORANDUM

TO: The Secretary
Thru: US <initialed>
ES <initialed>
FROM: F. Peter Libassi <signed>
SUBJECT: Sending Title IX Athletic Policy Interpretation to Congress

Attached is a draft of a legal memorandum on the issue of whether the Department is or is not obligated by statute to send the Title IX Athletic Policy Interpretation to Congress. It is only a draft and should not be shared outside the Department at this time. It has major implications for both OE and OCR which must be considered carefully before it becomes public. Also, it is being substantially revised.

The memorandum sets forth the arguments on each side of the issue.

In light of the nature of the athletic policy interpretation, its scope, its comprehensiveness, and its relationship to the enforcement process, it is my judgment that the better legal conclusion is that the Department is obligated to send the statement to Congress before it becomes effective.

Theoretically, respectable arguments could be advanced to support the opposite conclusion. If this policy interpretation were in fact a "guideline", suggestive of actions recipients might wish to consider, I would conclude that it need not be sent to the Congress. However, it is not a "guideline."

Caution: If we go too far in the other direction and claim that this policy statement is a "rule" of general applicability it would have to be approved by the President.

In my judgment this document falls in the middle - it is neither a suggestive "guideline", which would not have to be sent to the Congress, nor is it a "rule" which would have to be sent to the Congress and approved by the President. It is a policy interpretation which, whether mandatory or not, OCR expects to use to govern its administration of Title IX. It therefore must be sent to the Congress, but it need not be signed by the President.

I have other reasons for recommending that the policy statement be sent to Congress having to do with enforcement strategy, possible litigation, relations with Congress, avoiding controversy on procedural issues, etc.. These can be discussed at another time if necessary. But we must remember that if the policy statement is sent to Congress, the Congress may exercise its veto powers precipitating a Constitutional issue.

Attachment

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

To he to whom these presents shall come. Greeting:

By the virtue of the authority vested in me by the Archivist of the United Ststes, I certify on his behalf, under the seal of the National Archives of he United States, that the attached reproduction(s) is a true and correct copy of documents in his custody.

<signed>
Sally Ann Cummings 5/17/04
Chief, Civilian Records
National Archives at College Park
8601 Adelphi Rd.
College Park, MD 20740

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
THE OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201
<seal>
THE GENERAL COUNSEL
April 3, 1979

MEMORANDUM
TO: The Secretary
Thru: US __
ES __
FROM: F. Peter Libassi <signed>
SUBJECT: Applicability of Section 431(d) of the General Education Provisions Act to the Title IX Interpretation Reqardinq Intercollegiate Athletics

On December 11, 1978 the Department published in the Federal Register a proposed policy interpretation applying the provisions of Title IX of the Education Amendments of 1972 and its implementing regulations to intercollegiate athletics. 43 F.R. 58070. We have been asked whether this policy interpretation, when final, must be sent to the Congress under the provisions of section 431(d) of the General Education Provision Act, 20 U.S.C. 1232(d). Section 431(d) requires Congressional review of certain regulations. (The pertinent provisions of Section 431 are set forth in the attachment to this memorandum.)

After carefully considering arguments on both sides of this issue, we have concluded that the interpretation, when final, should be sent to the Congress.

DISCUSSION

I The language of the statute requires the policy to be sent to the Congress.

Section 431(d) of the General Education Provisions Act requires the transmission to the Congress of "any final regulation". Section 431(f) brings within the scope of section 431(d) a "regulation" under Title IX of the Education Amendments of 1972. Section 31(a)(l) defines the term "regulation", for purposes of all subsections of section 431, to include "interpretations". The Title IX policy interpretation on intercollegiate athletics is described in the Federal Register as a "policy interpretation" (emphasis supplied). It contains a number of significant interpretations of the Title IX statute and regulations, and is of general applicability. Since interpretations of general applicability regarding Title IX are "regulations" for purposes of section 431(d), it is clear that the policy interpretation must be sent to Congress.

In construing section 431(d), the Department must accord maximum weight to the statutory language, for as the Supreme Court has noted, it is a cardinal principle of statutory construction that "[tlhere is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning." United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940).

II The legislative history of section 431(d) supports the conclusion that the policy interpretation should be sent to the Congress.

Where a statute is plain on its face, "there is no need to refer to the legislative history"* However, in the interest of full analysis, we have reviewed the legislative history of section 431 and find that, taken as a whole, it supports the conclusion that the policy interpretation should be sent to the Congress. A detailed summary of that legislative history is set forth in the attachment to this memo.

A. The legislative history suggests that a key test to determine coverage of section 431(d) is whether the document is intended to govern the administration of a program or the activities of the public. The House Report which accompanied the passage of section 431(d) states that "the new procedure has reference [to] any administrative document of general applicability which the agency intends to govern the administration of applicable programs, or the activities of members of the public in connection with such programs." (H.Rept. No. 93-805, at 73 (1974)) (Emphasis supplied) The intercollegiate athletics policy interpretation is clearly intended to do both.

In the preamble to the December 11 Federal Register notice, the policy is described as "designed to provide a framework within which [complaints under Title IX] can be resolved, and to provide institutions of higher education with additional guidance on the requirements of the law relating to intercollegiate athletic programs." (43 F.R. 58071)

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* Ex Parte Collett, 337 U.S. 55, 61 (1949).

The policy is a comprehensive set of standards by which the Department will administer Title IX and assess a recipient institution's performance. For example, under Paragraph I,A., the policy states: "In assessing whether an institution's present intercollegiate athletic program complies with Title IX, the Department will initially determine whether the institution's average per capita expenditures for male and female athletes on financially measurable benefits and opportunities are substantially equal." Clearly, material of this sort, however it is labeled, is intended to "govern the administration" of Title IX with respect to intercollegiate athletics by telling interested persons how the Department intends to enforce the law. Its effect, if not its intent, is to "govern" (or at least strongly influence) "activities of members of the public."

B. The 1974 House Report on section 431(d) indicates that this provision would apply to any "piece of paper [which is] intended to be binding on the public". (House Rept. No. 93-805, at 73 (1974)) On the basis of this reference, it might be argued that a document which merely suggests a method by which members of the public may meet a legal requirement, but imposes no legal consequences if they fail to employ that method, is not within the scope of section 431. However, even if this argument is accepted, a fair reading of the policy interpretation suggests that it is "binding" in the sense used in the House Report.

For example, in summarizing Part I of the policy interpretation, the preamble to the December 11 Federal Register document states:

> Part I is designed to eliminate discrimination against men or women currently participating in intercollegiate programs. It requires the immediate elimination of discrepancies in average per capita expenditures for financially measurable benefits

and opportunities unless the institution can demonstrate that the discrepancies are based on differences in the costs of particular sports (e.g., equipment), their scope of competition (e.g., national, regional or local), or other nondiscriminatory factors. Part I also requires comparability with respect to those benefits and services that are not readily financially measurable. (43 F.R. 58072) (Emphasis supplied)

Other passages in the policy interpretation indicate that it is more than a mere set of suggestions for compliance, and that institutions cannot expect to ignore it without legal consequences.

C.The legislative history of section 431 also indicates that Congress has been generally concerned about exclusionary readings of that section. The House Report on section 431(d) cautioned: "It is not the intention of the Committee that the choice of descriptive words in the new language should be interpreted in an exclusionary manner." (H.Rept. No. 93-805, at 73 (1974)) (Emphasis supplied) The Senate Report on the 1976 amendment to section 431 cautioned against any attempt to "shield" "something that would ordinarily be considered of a regulatory nature "from Congressional consideration by giving it a different label. (Sen. Rept. No. 94-882, at 108 (1976)) The history of early provisions, such as the Green and Pucinski Amendments, is to the same effect.

The legislative history, taken as a whole, indicates that Congress intended section 431(d) to be liberally construed in favor of coverage and wanted close questions as to whether a particular document came within its scope to be resolved in favor of coverage.

III Conclusion.

We have carefully considered arguments which would support a conclusion that the policy interpretation need not be sent to the Congress under section 431(d). However, in view of the content and purpose of the policy interpretation, and in view of the clear language of the statute as well as its legislative history, we conclude that this document in its final form should be sent to the Congress.

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THIS IS TO CERTIFY that the collections of the Library of Congress contain a collection entitled PAPERS OF PATRICIA HARRIS, 1950-1983 (BULK 1977-1980) and that the attached photocopies - Box 306, Folder Papers of Patricia Roberts Harris, Department of Health and Human Services, Briefing File, Title IX Intercollegiate Athletics Policy, Nov. 20, 1979, eighty-two (82) unnumbered pages (entire folder) and the file folder - are a true representation from that collection of papers.

IN WITNESS WHEREOF, the seal of the Library of Congress is affixed hereto on October 22, 2003.

By: <signed>
Sandra M. Lawson
Acting Chief
Library of Congress
Photoduplication Service

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
THE OFFICE OF THE SECRETARY
WASHINGTON, D.C. 23251

<seal>

OFFICE OF THE
GENERAL COUNSEL

October 31, 1979

MEMORANDUM

FOR: The Secretary
Through: US ___
ES ___
FROM: Assistant General Counsel
Civil Rights Division
SUBJECT: Submission of Title IX Intercollegiate Athletics Policy to Congress Under Section 431(d) of GEPA

ISSUE

Whether the Department's Policy Interpretation regarding the intercollegiate athletic requirements of Title IX of the Education Amendments of 1972 and its implementing regulations must, pursuant to section 431(d) of the General Education Provision Act (GEPA), be transmitted to Congress for oversight before it takes effect.

CONCLUSION

My analysis of the text and the legislative history of Section 431 leads me to conclude that the Policy

Interpretation need not be transmitted to Congress under section 431(d) of GEPA. Thus, there is a sound legal basis to decide as a policy matter not to submit it for Congressional review.

At the same time, the current draft of the Policy Interpretation uses some language which may make it appear that this document imposes new legal requirements upon educational institutions and is therefore potentially misleading on the question of the applicability of Section 431(d).

Accordingly, I recommend that the final draft of the Policy Interpretation (PI) be reviewed by GC in conjunction with OCR to revise such potentially misleading and, in my view, incorrect language.

Analysis of Section 431 - Text of Statute

Section 431 of GEPA, 20 U.S.C. Sec. 1232, sets out the procedures to be followed in prcmulgating regulations relating to Federal education programs, including Title IX regulations. Subsection (a) of the statute defines "regulations" as "any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability. " Pursuant to subsection (b), these "regulations" are subject to the notice and comment rulemaking requirements established by Section 4 of the Administrative Procedure Act (APA), 5 U.S.C. §553.

Section 431 provides, further, that when a final "regulation" is published in the Federal Register, it must be

transmitted concurrently to both houses of Congress. The "regulation" then becomes effective within 45 days unless Congress, by concurrent resolution, disapproves it as being inconsistent with the statute under which it is issued. Section 431(d)(1). If a regulation is disapproved, the issuing agency may subsequently reissue it in modified form by publishing it in the Federal Register and simultaneously transmitting it to Congress with an explanation of how the modification cures the defects which led to disapproval. Section 431(e).

Section 431 clearly includes "interpretations" within its definition of "regulations" which are subject to Congressional oversight. However, it is unclear how expansive a meaning is to be given to the words which make up the statutory definition of "regulation" ("rules, regulations, guidelines, interpretations, orders, or requirements of general applicability"). These words themselves are amenable to both broad and narrow definition. For example, "interpretation" could cover nearly any statement made by the Department in the course of administering its programs or otherwise enforcing the law. Therefore, one must look to the legislative history of the statute and to any other available relevant sources to determine what Departmental documents the Congress intended Section 431 to cover.

Analysis of Section 431 - Legislative History and APA Analogy

Section 431's provisions for Congressional oversight of rulemaking relating to education programs were first added to GEPA in 1974. Pub. L. 93-380, Title V, section 509 (a). The provisions enacted came from the House bill, which required that any "standard, rule, regulation, or requirement of general applicability," upon publication in the Federal Register, be sent concurrently to Congress for review. There was no definition in the Act of what was meant by the inclusive wording "standard, rule, regulation or requirement of general applicability." However , the House Report on the Education Amendments of 1974 stated:

> The problem which this amendment seeks to meet is the steady escalation of agency quasi-legislative power and the corresponding attrition in the ability of the Congress to make the law. H.R. Rept. No. 93-805, 93rd Cong. 2d Sess. 73 (1974).

The same House Report discussed the intended coverage of the statute:

> It is not the intention of the Committee that the choice of descriptive words in the new language should be interpreted in an exclusionary manner. The "standards, rules, regulations and requirements of general applicability to which the new procedure has reference should be understood to mean any administrative document of general applicability which the agency intends to govern the administration of applicable programs, or the

activities of members of the public in connection with such programs. If an agency piece of paper is intended to be binding on the public, it should be issued under the procedures set forth in the new subsection (d) of section 431. Id. [emphasis added]

In 1976, Section 431 was amended by eliminating all references to "any standard, rule regulation, or requirement of general applicability" and substituting the current definition of "regulation." Pub. L. 94-482, Sec. 405. The legislative history of the 1976 amendment makes clear that no change in the meaning of the provisions of Section 431 as enacted in 1974 was intended. Rather, the Congress meant only to make sure that the Department could not avoid the effect of Section 431 by "calling something that would ordinarily be considered of a regulatory nature a name other than "regulation" and therefore attempt to shield it from Congressional consideration." See S. Report. No. 94-882, 94th Cong., 2d Sess., at 103 (1976).

From this legislative history, one can reasonably conclude that by "interpretation" (and the other terms used in defining "regulation") the Congress meant agency pronouncements which effectively serve as regulations – i.e., those which bind the regulated parties to speciofied standards which the agency has determined constitute requirements of the law. The PI clearly does not have such an effect. It describes how the Department will evaluate an educational institution's compliance with Title IX and its implementing regulation, primarily by setting fort:? the

major factors which the Department considers relevznt to compliance determinations. Documentation of a fail.:re to meet the PI compliance factors does not constitute proof that an educational institution has violated Title IX. It does give the Department a basis on which to supporz a finding that there has been a violation. But if challsnged, the Department must still prove that there has 5een a failure to meet the standards contained in Title IX an2 its implementing regulation.

As described above, Section 431 contains, in conjunction with its Congressional oversight requirement, a provision requiring that agency regulations be issued in accordance with the notice and comment procedures of Section 4 of the APA. Therefore, an analysis of Section 431 leads one to look to the APA and related judicial decisions for guidance.

Section 4 of the APA distinguishes legislative rules from interpretative rules, policy statements, and rules of agency organization, procedure or practice. It requires public participation only in the promulgation of legislative rules.

Analyzing judicial decisions interpreting the APA, Kenneth Culp Davis states that the 'talismanic factor' distinguishing legislative from interpretative rules is "whether or not the agency intended to exercise delegated legislative power to make law through rules; if it did, the rule is legislative, and if it did not, the rule is interpretative". Administrative Law of the Seventies, July, 1977 Cumulative Supplement, §5.03-3, p. 52. Applying this test, there is little

doubt that the PI is not a legislative rule subject to notice and comment requirements under the APA.

Professor Davis' treatise also notes that a number of courts have required agencies to use the notice and comment procedures even for rules which are interpretative in nature. In these cases, the test has been the "substantial impact" of the administrative action upon the legal rights and obligations of regulated parties. Where there is a substantial impact, Davis explains, common law notions of fairness may require an agency to follow notice and comment procedures. Id. A recent U.S. Court of Appeals expanded on the concept of "substantial impact" by focusing on agency actions which go beyond a mere "clarification of statutory language or a public indication of how the [agency] will exercise a discretionary power." Joseph v. United States Civil Service Commission, 554 F. 2d 11407 1153 (D. C. Cir. 1977).

Applying these criteria to the PI, one may conclude that its nature does not require the Department to follow notice and comment procedures. * It does not affect legal rights and obligations in a way that goes beyond existing law and regulations. Rather, it can fairly be characterized as a document which clarifies statutory and regulatory terms, or which provides a public indication of how the Department will exercise its enforcement power under the law and regulations. The importance given by the public to the PI derives primarily from the fact that its publication is viewed as a symbol of the Department's commitment to effective enforcement of the law. This does not support a conclusion

that the PI is a legislative rule, or a "regulation" requiring submission for Congressional oversight.

In summary, examination of the legislative history of Section 431, and of the analogous APA provisions, provide a sound legal basis for concluding that the PI is not covered by Section 431.

Other Legal Considerations

You should be aware that submission of the PI to the Congress would strongly suggest that the document is a "regulation", and that this, in turn, would subject it to submission for presidential approval under the terms of Title IX, 20 U.S.C. Sec. 1682. Section 1682 does not specify any limitations on the time for presidential action.

A decision not to submit the PI to Congress under section 431 is likely to preclude the Department from later asserting that the PI is "binding" on the public and on the courts as if it were a legislative rule. I do not believe that the lack of the "binding" label will inhibit our enforcement effort.

Finally, and obviously I should note that there is a strong argument that the Section 431(d) congressional oversight requirement is unconstitutional. However, the constitutionality argument applies to all Department issuances potentially subject to Section 431(d), and we do not normally use it as basis for withholding regulations from Congressional review."

<signed>
Albert T. Hamlin

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* The fact that the proposed PI was set out for comment and has been redrafted in light of the comment received is.not inconsistent with this conclusion. The Department's provision of a comment period may be rcgarded as a voluntary effort to ensure that the PI was clear and its content was based on accurate information.

** The gist of the argument is this:
Disapproval by Congress of binding agency regulations, under Section 431(d), constitutes legislation. However, since the disapproval is accomplished by concurrent resolution, the action of Congress is never presented to the President. This violates Article I, Section 7, clause 2 of the Constitution, which requires that every bill passed by the House and Senate be presented to the President before it becomes law.

C. & B. Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act*, 115-16 (1985):

The seventh day of debate began at noon on Friday, February 7. Five titles remained.

"Title VI [Federally Assisted Programs]," called the clerk.

Oren Harris (D-Ark.) offered an amendment that would drastically weaken the section and remove all provisions for judicial review. While Bill McCulloch was in the rest room, Majority Whip Hale Boggs rose in support of the amendment. Returning to the floor, McCulloch heard about the whip's action and immediately became suspicious. Boggs was not only a Democratic leader but also a close friend of Lyndon Johnson. McCulloch feared another betrayal was in the offing, such as had occurred the previous day when the permanent life of the Civil Rights Commission was reduced to four years. This looked like a last-minute effort by the Democrats to avoid a party-splitting filibuster in the Senate by compromising with their southern wing. McCulloch had seen this tactic work before, when the Civil Rights Act of 1957 was weakened.

"Look!" McCulloch's wife, Mabel, whispered to Roy Wilkins, who was sitting next to her in the gallery. "Bill's face is red. He's mad!"

McCulloch grabbed the microphone. "If we pick up this old provision which does not provide for judicial review," he announced angrily, "I regret to say that my individual support of the legislation will come to an end."

Shocked silence filled the House. The bipartisan coalition, a tenuous thread at times, was about to break. McCulloch, flaming from the neck up, stared straight ahead, fed up with being repeatedly betrayed each time he thought he and the Democrats had a firm agreement. His startled colleagues, including Emanuel Celler, gave Bill McCulloch a

long look and decided he meant it. The Democrats knew they had to have McCulloch's help to get any bill at all. Reacting to his threat, the House crushed Harris's amendment by a standing vote, 80-206. Not one Republican voted against McCulloch. It was his finest hour.

Catastrophe averted, H.R. 7152 trudged on.

National Wrestling Coaches Association
President
TJ Kerr • California State University, Bakersfield
8000 Kroll Way, Unit 43 • Bakersfield, CA 93311
805-664-2343 • FAX 805-664-3469

October 20, 1995

Ms. Norma V. Cantu
Assistant Secretary for Civil Rights
United States Department of Education
400 Maryland Avenue, S .W.
Washington, D.C . 20202-1100

Dear Ms. Cantu,

Thank you for your letter and "clarification" of the three-prong test of discrimination related to Title IX compliance. I guess you did "clarify" some issues a little . However, it is a mystery to me how you arrived at your conclusions the most well-publicized of which is:

> "Finally, you will note that nothing in the clarification requires that an institution cap or eliminate participation opportunities for men... The question of how to comply with Title IX and to provide equal athletic opportunities for all students is one of the predominant challenges that institutions face today, especially in the face of increasing budget constraints . OCR is aware of and sensitive to the concerns that have been expressed in this area ." (emphasis added) .

Ms Cantu, the problem is that there is nothing in "clarification" which explains how elimination can be avoided. In fact, it is OCR's definitions and OCR's formula which virtually assure the elimination of the non-scholarship/walk-on athlete. In support of that proposition,

I ask you to read the following section in the context of these points :

(1) Note how often OCR policy and definition are cited as the underlying precipitator of the problem. As you read the section consider fairly whether it is indeed OCR definitions and policies which are the source of the problem.

(2) Ask yourself whether your interjection of the "budget constraint" problem is a red herring which only serves to obfuscate and confuse the average person who does not understand the relationship of the proportionality test as it relates to the elimination of male athletes, particularly walk-ons.

The Definition of Participants

As administrators, coaches and athletes have previously explained to you, OCR's simple and fair redefining of the term "participant" alone might well have solved the problem and saved the athletic lives of thousands of male walk-ons years ago. Even Charlotte West and Phyllis Howlett, who headed the NCAA Gender Equity Task Force agreed that this was a logical solution.

Let's begin with the basics so that there will be no confusion or smoke. In the art of bureaucratic bean counting, we must be sure to know a bean when we see one. The beans in our case are defined as athletic "participation opportunities." Under OCR's policy, all athletes -- whether scholarship or non-scholarship(walk-ons) --are counted as beans. In that there are many more male walk-ons beans than female walk-ons beans, your approach discriminates against males in a most subtle, pernicious and disastrous manner --educational administrators feel compelled to drop male non-scholarship athletes because OCR's definition will not allow them to create female "participatory opportunities" which are the counterpart to the male non-scholarship/walk-on bean.

Let me (again) expiain for the record with two brief anecdotes which classically represent ths ubiquitous problem.

(1) At Michigan State the male track team was much larger than the female team because it had many more walk-ons The athletic director, a female, tried to persuade the female coach of the female track team to accept walk-ons The female track coach refused because under the OCR's definition, she doesn't have to. As a result the male track coach was forced to cut his non-scholarship/walk-on athletes to meet the OCR's proportionality quota This phenomenon is universal--it is occurring on almost every campus in this country

(2) The California University system was sued by the National Organization of Women (NOW) and is presently under court order to achieve proportionality. Guess how the system is achieving proportionality? That's right --nearly every male team in California is being "capped" --which means the elimination of walk-ons.

What Title IX purpose does the elimination of walk-ons serve? How can universities avoid this unfair and unintended consequence of Title IX under your present scheme? Finally, where is the budget constraint problem when the real issue is the fact that administrators are dropping walk-ons?

(1) As everyone is well aware, walk-ons are virtually free to the university and should be encouraged, not discouraged

(2) Non-scholarship athletes not only cost the university nothing, they also do not represent a discriminatory factor in athletics for Title IX purposes, do they? They are simply kids who pay their tuition and fees like every other student, but who are being dropped for no other reason than to satisfy your quota.

(3) Since the number of female and male athletic teams across the country are almost equal (about 7,000), it is time to begin to require that female coaches allow walk-ons to participate --like males coaches do.

If administrators continue to move toward proportionality by eliminating walk-ons, we will soon lose 100,000 non-scholarship athletes, or approximately 1/2 of all of the athletes competing at the college level.

The best and fairest solution of course is to count only the scholarship beans as "participants" for Title IX purposes.

Obviously the impact of your definition on many campuses has also been to simply eliminate teams or programs. If the present trend continues many male olympic sports will soon be extinct

Defining and Interpreting the Prongs and Their Interrelationship

You have continually insisted that each prong is fairly defined and interpreted and enforced and that a school can comply with Title IX by simply complying with any one prong.

We agree that a school can comply with Title IX by complying with only one prong as long as that prong is prong 1. Ultimately, prongs 2 and 3 lead inexorably to prong 1, and if you can name on instance where that is not true, I will be satisfied

Prong One -The Proportionality Test

Prong one is a quota which requires schools to substantially achieve proportionality. That is, the gender athletic "participatory opportunity" ratio must substantially mirror the gender enrollment ratio at the school.

Let me convey to you, and for the record, my position about this prong --the proportionality rule or test:

(1) Prong 1, although a quota, was relatively fair when female participation was at 10% and female enrollment was 40% in the early 1970's in order to "jumpstart" more female participation. Now, of course female participation is approaching 40% and enrollment is approaching 55%. The small difference in participation which presently exists is easily explained by the non-discriminatory fact that males "walk on" in much greater numbers than females.

(2) Also, in my opinion, the proportionality rule is unconstitutional in light of the recent *Adarand* case in that males under prong 1 are worse off constitutionally than the white contractor in *Adarand.* In *Adarand,* hispanics were given only special consideration in the contract bidding process. Under Title IX's proportionality rule females must be chosen and/or male must be eliminated

(3) Furthermore, what is the nexus between gender enrollment ratios and athletic participation ratios? In other words, why should an enrollment ratio be used to determine an athletic participation ratio? Everyone knows that most athletes are recruited, so why do you use the university student population --rather than the high school population --as your quota pool?

(4) You have often argued that prong 1 is not unconstitutional and not a quota because it must be considered in the context of the other two prong which are alternative approaches to the satisfaction of Title IX compliance. Let me just say this about that: most importantly, males are eliminated only under prong I, so it must be viewed in isolation when considering its constitutionality as it relates to the elimination of male athletes and programs. Also, and as I will discuss below, both prongs 2 and 3 lead directly back to prong 1. There is not way to permanently or ultimately satisfy Title IX by simply satistjlng either prong 2 or 3.

Finally, why is prong 1 necessary since you already have prong 2 as an integral pan of the test of discrimination? If, in fact, prong 2 means what it says --that a university must increase female participation, why do you need prong 1 except in its capacity to serve as a quota? Doesn't prong 2 alone filly satisfy the congressional intent to increase female participation?

Prong 2 -The Continuing Expansion of Female Programs Test

Prong 2 requires that a school have a history and continuing practice of program expansion for female athletes (until the school achieve proportionality).

This prong, which you insist stands alone, can never permanently satisfy Title IX until proportionality is reached - can it? Never in your clarification do you explain how a school can comply with Title IX (except for a brief period of time) by satisfying this prong. As Brown University found out the hard way, it is much better to wait until an OCR audit and just drop male athletes than to create one of the top female sports programs in the country back in the 70's. If you disagree with this proposition maybe you can name one school which has permanently satisfied its obligations to Title IX by complying with prong 2.

The practical impact of prong 2 is, of course, that educational administrators simply drop male walk-ons and/or sports programs because they realize that they will be forever on the prong 2 treadmill because they can never achieve proportionality by adding female participants (particularly when the OCR refuses to change its definition of "participatory opportunity").

Finally, since prong 2 calls for a history and continuing practice of program expansion for females, consider this national picture: There are nearly as many female teams nationally as male teams (about 7,000 each). If prong 2

means what it says --program expansion, prong 2 should now be satisfied, shouldn't it? Again, isn't it time to begin to add female no-scholarship athletes to these programs3

Prong 3 --The Accommodation of Female Interests Test

Prong 3 requires that the school must fully and effectively accommodate all of the interests and abilities of the underrepresented sex (females) (until the school achieves proportionality).

There are two important factors operating synergistically here which, again, virtually ensure elimination of male athletes.

First, only the interest and abilities of females are considered under this prong because the way "underrepresentation" is defined by the OCR is based on the proportionality rule which ignore the affect of walk-ons and sports programs such as wrestling which are disproportionately composed of males. It is absurd and a distortion of Congressional intent to interpret prong 3 to mean that if there is 99% unmet interest among male athletes on campus and 1% interest among females, the male interest must be ignored and the female interest must be fully and effectively accommodated.

The second factor (again, like under prong 2) is --how long does a school need to continue to survey females to ferret out unmet interests? Obviously, forever or until the school achieves proportionality by eliminating male athletes. Again, if this is not true, please specify on school which has satisfied Title IX permanently simply by complying with prong 3.

The Most Terrible Unintended Consequence of OCR Enforcement

There is another apparent tangential, subtle, but important, factor which I believe is escaping your attention

here and may indeed be the worst unintended consequence of the OCR Title IX interpretation and enforcement. Why is it that male enrollment has gone down at the university level, while female enrollment has risen? Similarly, why is it that males in high school while losing athletic opportunities, are joining gangs in ever increasing numbers? Isn't it just as important that males have athletic opportunities as females? Remember in your zeal to vindicate the rights of females, there are also many males out there whose interests and rights you are supposed to be representing too

Conclusion and Summary

In conclusion and summary, Ms Cantu, I fully support equal rights and opportunities for females. And I fully support Title IX and its original intention to increase female opportunities.

However, in my opinion, your interpretation and clarification is unresponsive to the spirit of the Congressional request, and your policies are contrary to Congressional intent related to Title IX in that they will lead to the elimination of male athletics as we know them.

If you do not clarify these in a manner which permits male sports programs and athletes to survive, we will be forced to seek additional hearings and remedial legislation.

Sincerely,
<signed>
TJ Kerr
NWCA President

Archived Information

FOR RELEASE

Contact: Rodger D. Murphey January 18, 1996

Civil Rights Office Clarifies Intercollegiate Athletics Policy

In response to inquiries from college presidents and athletics associations, the U.S. Department of Education's Office for Civil Rights (OCR) has issued a final clarification of its policy on Title IX and intercollegiate athletics.

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs and activities. Under Title IX, if an institution that is a recipient of federal funds sponsors an athletic program, it must provide equivalent athletic opportunities for males and females. The clarification resulted from discussions with interested parties over a two-year period and from consideration of nearly 300 written comments.

"My conversations with the university community and with athletic associations and other groups have confirmed that there has been some confusion over one segment of the requirements of Title IX as it applies to sports," said Norma Cant?, assistant secretary for civil rights. "In an effort to be as helpful as possible to colleges, student athletes and others who deal with this issue, OCR has worked to provide substantive, specific and meaningful guidance to clarify the

standards that have been applied by four administrations. This clarification confirms that OCR's focus continues to be on increasing opportunities for all students."

Cant? said the legal obligations spelled out in this clarification of the Title IX policy guidance have been in effect since 1979, noting that every federal court which has addressed the issue since then has approved of the standards provided by OCR.

The policy guidance includes a three-part test that OCR uses to assess an institution's compliance with Title IX in intercollegiate athletics:

- Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the members of that sex; or
- Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

If an institution has met any part of this standard, OCR will find the institution in compliance with the participation provision of Title IX in the area of athletics.

Cant? said it is important to note that, contrary to claims by some who have advocated that OCR abandon the three-part test that was first applied in 1979, the test does not establish or endorse quotas. Cant? reiterated in her letter transmitting the clarification that there are three separate avenues for compliance and stressed there are no "strict numerical formulas or 'cookie cutter' answers" to questions that are "inherently case- and fact-specific." She noted that OCR has "tried to allow for as much flexibility as possible in the clarification, while remaining true to the Congressional mandate of Title IX.

The final clarification is the result of a number of discussions with interested parties over a two-year period and consideration of the nearly 300 written comments received by OCR on a draft that was issued Sept. 20, 1995.

The guidance is being sent to over 4,500 interested parties, including the presidents of all colleges and universities that have intercollegiate athletic programs.

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NOTE TO EDITORS: A copy of the clarification of Title IX athletics is avail. ble upon request.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WRESTLING COACHES ASSOCIATION,
1976 Auction Road
Manheim, PA 17545,

COMMITTEE TO SAVE BUCKNELL WRESTLING,
110 Lomond Court
Utica, NY 13502,

MARQUETTE WRESTLING CLUB,
600 North Broadway, Suite 300
Milwaukee, Wisconsin 53202,

YALE WRESTLING ASSOCIATION,
2 Stamford Plaza, Suite 1501
281 Tresser Boulevard
Stamford, CT 06901,

and

COLLEGE SPORTS COUNCIL,
1825 I Street, NW Suite 400
Washington, DC 20006,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION,
400 Maryland Avenue, SW
Washington, DC 20202,

Defendant.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The National Wrestling Coaches Association ("NWCA"), the Committee to Save Bucknell Wrestling ("Bucknell Wrestling"), the Marquette Wrestling Club ("Marquette Wrestling"), the Yale Wrestling Association ("Yale Wrestling"), and the College Sports Council ("CSC"), plaintiffs in the above-captioned action, seek declaratory and injunctive relief based on the following allegations.

NATURE OF THE ACTION

1. Plaintiffs bring this action to protect intercollegiate and scholastic athletic opportunities and teams from further elimination caused directly and indirectly by the unlawful rules that Defendant United States Department of Education ("USDE") has issued under the color of implementing Title IX of the General Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 (1994) ("Title IX").

2. In this action, Plaintiffs allege that the rules that USDE announced to the regulated community on January 16, 1996 exceed USDE's statutory authority by effectively mandating the very discrimination that Title IX prohibits, all in order to meet a regulatory test that Congress did not authorize USDE to adopt. Further, Plaintiffs allege that USDE unlawfully failed to change its Title IX rules in 1996 and that USDE's current Title IX rules so flagrantly violate USDE's duties under Title IX as to warrant this Court to order USDE to issue revised Title IX rules consistent with Title IX and constitutional Equal Protection guarantees. Finally, Plaintiffs allege that various procedural infirmities of the relevant USDE Tile IX rules render those rules null and void.

3. Plaintiffs seek declaratory and injunctive relief to compel USDE to comply with the Equal Protection

component of the Due Process Clause, U.S. CONST. amend. V, the discrimination prohibitions of Title IX, 20 U.S.C. §§ 1681-1682, and the rulemaking requirements of both Title IX, 20 U.S.C. § 1682, and the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1994) ("APA"). As set forth more fully below, Plaintiffs seek the following declaratory and injunctive relief:

(a) a declaratory judgment that USDE's Title IX rules violate the substantive discrimination prohibitions of Title IX and the Equal Protection component of the Due Process Clause of the U.S. Constitution;

(b) a declaratory judgment that, on January 16, 1996, USDE unlawfully denied petitions to amend or repeal those unlawful aspects of USDE's Title IX rules;

(c) a declaratory judgment that, in authorizing intentional discrimination under its unlawful Title IX rules, USDE has consciously and expressly adopted a general policy that abdicates its statutory duty to prevent discrimination;

(d) a declaratory judgment that USDE and its predecessor substantively amended the Title IX regulations under the guise of interpretation, without following the APA-mandated notice-and-comment rulemaking procedures;

(e) a declaratory judgment that the USDE's Title IX rules have no force or effect because the rules have not met the procedural requirements of 20 U.S.C. § 1682;

(f) an order vacating USDE's unlawful Title IX rules and remanding them for a rulemaking consistent with this Court's substantive holdings in this action and in accordance with a schedule set by this Court; and

(g) an order staying all disparate-impact

components of USDE's Title IX rules until USDE promulgates a final rule pursuant to this Court's order.

PARTIES

4. Plaintiff NWCA, incorporated under the laws of Iowa and headquartered in Manheim, Pennsylvania, is a not-for-profit corporation representing the interests of collegiate and scholastic wrestling coaches. NWCA's member-coaches have ongoing professional, economic, and aesthetic interests in collegiate and scholastic wrestling, which interests have been harmed (and continue to be harmed) by the elimination of intercollegiate wrestling opportunities and teams by colleges and universities (collectively hereinafter, "institutions") seeking to comply with USDE's unlawful Title IX rules.

5. Plaintiff Bucknell Wrestling, an unincorporated association of Bucknell University ("Bucknell") alumni and student-athletes, is headquartered in Utica, New York. Bucknell Wrestling is a not-for-profit association formed to lobby Bucknell to abandon its stated plans to eliminate its men's intercollegiate wrestling program in the 2002-03 academic year and, if Bucknell eliminates the program, to reinstate it for the next academic year. Bucknell Wrestling's members include underclassmen on Bucknell's 2001-02 wrestling team who want to wrestle for Bucknell in the 2002-03, 2003-04, and 2004-05 academic years. Bucknell Wrestling's members have ongoing participatory and spectator interests in the Bucknell wrestling program, which interests have been harmed by (and threaten to be eliminated by) Bucknell's efforts to comply with USDE's unlawful Title IX rules.

6. Plaintiff Marquette Wrestling, an unincorporated association, is headquartered in Milwaukee,

Wisconsin. Marquette Wrestling is a not-for-profit association of Marquette University (Marquette") alumni and student-athletes formed originally to raise funds to support Marquette's wrestling program when Marquette terminated funding after the 1992-93 academic year. For the 1993-94 through 2000-01 academic years, Marquette Wrestling funded the Marquette wrestling program without direct financial support from Marquette. Marquette Wrestling's members have participatory and spectator interests in bringing wrestling back to Marquette – which eliminated its wrestling program after the 2000-01 season – and such interests have been harmed by (and continue to be harmed by) Marquette's efforts to comply with USDE's unlawful Title IX rules.

7. Plaintiff Yale Wrestling, an unincorporated association, is headquartered in Stamford, Connecticut. Yale Wrestling is a not-for-profit association formed to support wrestling at Yale University ("Yale"). Yale Wrestling supports the Yale wrestling club financially and seeks its eventual reinstatement as an intercollegiate varsity sport. Yale Wrestling's members have ongoing participatory and spectator interests in the Yale wrestling program, which interests have been harmed by (and continue to be harmed by) Yale's efforts to comply with USDE's unlawful Title IX rules.

8. Plaintiff CSC, incorporated under the laws of the District of Columbia and headquartered in Washington, D.C., is a not-for-profit corporation serving as an umbrella group for organizations representing the interests of collegiate coaches and athletes. CSC members include, without limitation, the nationwide collegiate coaches associations for men's and women's swimming, men's and

women's track and field, men's wrestling, and men's gymnastics. The individuals who are members of CSC's member organizations have professional, economic, participatory, and spectator interests in intercollegiate swimming, track and field, wrestling, gymnastics, and other sports. These interests have been harmed (and continue to be harmed) by the elimination of intercollegiate men's sports opportunities and teams that result from institutions' efforts to comply with USDE's unlawful Title IX rules.

9. Defendant USDE, headquartered in the District of Columbia, is an executive department of the United States government. Congress has empowered USDE to extend federal financial assistance to educational programs and activities.

JURISDICTION AND VENUE

10. This case arises out of USDE's violation of Sections 901 and 902 of Title IX, 20 U.S.C. §§ 1681, 1682, Section 4 of the APA, 5 U.S.C. § 553, and the Equal Protection component of the Due Process Clause, U.S. CONST. amend. V. Plaintiffs' claims, therefore, raise federal questions, over which this Court has jurisdiction pursuant to 28 U.S.C. § 1331 (1994).

11. Under Section 10(e) of the APA, 5 U.S.C. § 706, this Court shall hold unlawful and set aside agency action that is unlawfully withheld or that is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, or promulgated without observing the procedures required by law. Under 28 U.S.C. §§ 2201-2202 (1994) and Fed. R. Civ. Proc. 57, this Court also may issue declaratory relief and other necessary or proper relief.

12. The allegations raised herein constitute good cause to expedite this action under Fed. R. Civ. Proc. 57 and 28 U.S.C. § 1657(a).

13. Pursuant to 28 U.S.C. § 1391(e), venue is proper in the District of Columbia, where USDE is headquartered.

STATUTORY BACKGROUND

14. Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 (1994) ("Title VI"). 118 Cong. Rec. 5802, 5807 (Feb. 28, 1972) (Sen. Bayh); *North Haven Board of Education v. Bell, 456 U.S. 512, 529 (1982)* ("meaning and applicability of Title VI are useful guides in construing Title IX . . . to the extent that the language and history of Title IX do not suggest a contrary interpretation").

15. Like Title VI's prohibition on racial discrimination, 42 U.S.C. § 2000d, Section 901(a) of Title IX broadly prohibits gender-based discrimination in federally funded educational programs and activities. 20 U.S.C. § 1681(a).

16. Unlike Title VI, however, Title IX incorporates the anti-quota provision from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j) (1994), into Section 901(b), which states *inter alia* that "Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any

community, State, section, or other area." 20 U.S.C. § 1681(b).

17. Like Title VI's rulemaking provision, 42 U.S.C. § 2000d-1, Section 902 of Title IX authorizes and directs "each Federal department and agency . . . empowered to extend Federal financial assistance . . . to effectuate the provisions of section 1681 . . . by issuing rules, regulations, or orders of general applicability." 20 U.S.C. § 1682. Section 902 further states that "No such rule, regulation, or order shall become effective unless and until approved by the President." *Id.*

18. Congress patterned Section 902 on Section 602 of Title VI, 42 U.S.C. § 2000d-1, under which the President must publish his or her approval in the *Federal Register* before the rule, regulation, or order takes effect.

19. On November 2, 1980, President James E. Carter issued Executive Order 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980), which delegated to the Attorney General the presidential authority to approve rules and to coordinate the implementation and enforcement of Title IX and other civil rights legislation.

20. On June 3, 1981, Attorney General William French Smith delegated to the Assistant Attorney General in charge of the Department of Justice's Civil Rights Division the implementation and enforcement authority (but not the rule-approval authority) that Executive Order 12,250 had delegated to the Attorney General.

REGULATORY BACKGROUND

1975 HEW Regulations

21. On June 20, 1974, the Department of Health, Education & Welfare ("HEW") issued proposed regulations

implementing Title IX. 39 Fed. Reg. 22,228 (June 20, 1974). Regarding athletics, the proposal required institutions to assess student interest in athletics. The proposed rule did not, however, require equal expenditure for each gender or for each team.

22. On June 4, 1975, HEW issued final regulations implementing Title IX. 40 Fed. Reg. 24,128 (June 4, 1975) (*codified at* 45 C.F.R. §§ 86.1-.71). HEW's regulations regarding athletics, 45 C.F.R. § 86.41 (2001), include a three-year phase-in period, 45 C.F.R. § 86.41(d), which expired on July 21, 1978.

23. In the preamble to its final rule, HEW indicated that it eliminated the proposal's requirement to assess student interest because commenters misinterpreted it as a requirement to conduct an annual student poll and to offer teams based on the result of that poll. 40 Fed. Reg. at 24,134. In eliminating that proposed requirement, however, HEW expressed its intent that institutions take student interest into account when determining what sports to offer. *Id.*

24. The regulation requires institutions to provide "equal athletic opportunity for members of both sexes." 45 C.F.R. § 86.41(c). The rule lists ten factors that HEW will consider "among other factors" to determine whether equal opportunities are available. *Id.* The first factor is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes." 45 C.F.R. § 86.41(c)(1). The other nine factors include equality of facilities, equipment, and housing, scheduling of games and practice, dining services, travel, and per diems, publicity, and coaches and tutors. *See* 45 C.F.R. § 86.41(c)(2)-(10).

25. President Gerald R. Ford signed and approved the HEW regulations on May 27, 1975, which was published in the *Federal Register*. 40 Fed. Reg. at 24,137.

1979 HEW Policy Interpretation

26. In the months after HEW's phase-in period expired, HEW received 93 complaints against 62 colleges and universities and, on December 11, 1978, HEW's Office for Civil Rights issued a proposed "policy interpretation" as a framework for resolving the complaints. 43 Fed. Reg. 58,070, 58,071 (Dec. 11, 1978).

27. HEW recognized that differences in athletic interests between genders could cause participation rates to differ, even at institutions that provide equal opportunity. *See* 43 Fed. Reg. at 58,072 ("Intercollegiate athletic programs that provide *equal opportunities* for both sexes may offer different sports, and have *different participation rates* and varying competition opportunities for men and for women, because their interests and abilities may be different") (emphasis added).

28. On December 11, 1979, HEW issued its policy interpretation, which retains the framework of the proposed policy interpretation but further explains the concept of "equal athletic opportunity" to provide the guidance requested by those commenting on the proposed policy interpretation. 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) ("1979 Policy Interpretation").

29. The 1979 Policy Interpretation's guidance on "equal athletic opportunity" consists of an "Overall Determination of Compliance" and three specific components: (1) determination of interests and abilities; (2) selection of sports; and (3) selection of the level of competition. 44 Fed. Reg. at 71,417-18. In its level-of-

competition component, HEW addressed "competitive opportunities in terms of the competitive team schedules available to athletes of both sexes" under the authority that 45 C.F.R. § 86.41(c) provides for HEW to consider "other factors" beyond those enumerated in the regulation. *See* 44 Fed. Reg. at 71,417.

30. The "Overall Determination of Compliance" contains the following three criteria:

(a) whether an institution's policies are discriminatory in language or effect;

(b) whether the institution's program as a whole includes substantial and unjustified disparities in the opportunities or treatment afforded to male and female athletes; and

(c) whether segments of the institution's program include disparities in the treatment and opportunities that are substantial enough to deny equality of athletic opportunity.

31. With regard to assessing interests and abilities, the 1979 Policy Interpretation allows institutions to assess students' athletic interests and abilities by any non-discriminatory method, provided that:

(a) the process takes into account the nationally increasing levels of women's interests and abilities;

(b) the methods do not disadvantage the members of the underrepresented gender;

(c) the methods of determining ability consider team performance records; and

(d) the methods are responsive to the expressed interests of students of the underrepresented gender capable of intercollegiate competition.

32. With regard to selecting sports, the 1979 Policy Interpretation does not require institutions to integrate teams or to field male and female teams in all sports. Under the 1979 Policy Interpretation, however, if an institution fields a team in a contact sport, it must also field a team for the underrepresented gender if opportunities have historically been limited and there is sufficient interest to support a viable team with a reasonable expectation of intercollegiate competition. For a non-contact sport, the institution must field a team for the underrepresented gender if that gender has insufficient skill to compete on an integrated team.

33. With regard to selecting the level of competition, the 1979 Policy Interpretation does not require institutions to upgrade teams to intercollegiate status absent a "reasonable expectation" that intercollegiate competition will be available in the institution's normal competitive region. When opportunities for a gender have been limited, however, the 1979 Policy Interpretation may require the institution to encourage development of competition in the region. According to the level-of-competition component of the 1979 Policy Interpretation, in effectively accommodating the interests and abilities of student-athletes, institutions must provide opportunities for intercollegiate competition and competitive team schedules that reflect their students' athletic abilities. 44 Fed. Reg. at 71,418. The 1979 Policy Interpretation sets forth a three-part test to assess compliance with this level-of-competition component of "equal athletic opportunity":

(a) whether the institution provides intercollegiate "participation opportunities" in numbers substantially proportionate to enrollment;

(b) if not, whether the institution can show a

continuing history of expansion that is demonstrably responsive to the developing interest of the underrepresented gender; and

(c) if not, whether the institution can show that the interests and abilities of the underrepresented gender are "fully and effectively accommodated."

This component of the 1979 Policy Interpretation is known as the "Three-Part Test."

34. The 1979 Policy Interpretation states that "[t]he final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulations to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available."

35. No President (before November 2, 1980) or Attorney General (after November 2, 1980) has approved the 1979 Policy Interpretation pursuant to 20 U.S.C. § 1682 and Executive Order 12,250. *See* paragraphs 18-20, *supra*.

Formation of USDE and the 1980 USDE Regulations

36. The Department of Education Organization Act of 1979, Pub. L. No. 96-88, 93 Stat. 668 (Oct. 17, 1979), created USDE from certain educational components of HEW, with the remaining components of HEW renamed the Department of Health & Human Services ("HHS"). 20 U.S.C. § 3508(b) (1994).

37. After its creation as a separate agency, USDE promulgated the education-related regulations previously issued by HEW and other agencies as the Education title of the *Code of Federal Regulations*. 45 Fed. Reg. 3082 (May 9, 1980). HHS, the non-USDE remnant of the former HEW, retained its own Title IX regulations. *See* 45 C.F.R. § 86.1-.71.

USDE's Title IX regulations mirror the HEW/HHS regulations, with the names of the relevant offices and departments changed (*e.g.*, replacing HEW with USDE). *Compare* 34 C.F.R. § 106.1-.71 (2001) (USDE) *with* 45 C.F.R. § 86.1-.71 (2001) (HEW/HHS).

38. No President (before November 2, 1980) or Attorney General (after November 2, 1980) has approved the 1980 USDE regulations pursuant to 20 U.S.C. § 1682 and Executive Order 12,250. *See* paragraphs 18-20, *supra*.

1996 USDE Clarification

39. On May 9, 1995, the House Subcommittee on Postsecondary Education, Training and Life-long Learning of the Economic and Educational Opportunities Committee held a hearing on Title IX and the Three-Part Test.

40. On June 7, 1995, 142 Members of Congress wrote the Assistant Secretary for Civil Rights[1] expressing wide agreement in Congress that USDE's Office for Civil Rights needed to issue a revised policy interpretation because, contrary to the legislative intent behind Title IX, the Three-Part Test was causing institutions to eliminate men's

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[1] At the time, the Hon. Norma V. Cantú served as the Assistant Secretary for Civil Rights.

athletic opportunities to achieve proportionality, without corresponding increases in women's athletic opportunities.

41. On September 20, 1995, USDE sent a proposed "clarification" of the 1979 Policy Interpretation to over 4,500 interested parties. "Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test" (Sept. 20, 1995) (*transmitted by* Letter from Norma V. Cantú, Assistant Secretary, Office for Civil Rights, Department of Education (Sept. 20, 1995)).

42. On January 16, 1996, the USDE issued its "clarification." "Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test" (Jan. 16, 1996) (*transmitted by* Letter from Norma V. Cantú, Assistant Secretary, Office for Civil Rights, Department of Education (Jan. 16, 1996)) ("1996 Clarification").

43. In the 1996 Clarification, USDE acknowledged receipt of comments suggesting that the 1979 Policy Interpretation "provided more protection for women's sports than intended by Title IX" but dismissed those comments because "it would not be appropriate to revise the 1979 Policy Interpretation."

44. The 1996 Clarification asserts that the proportionality prong of the Three-Part Test is a "safe harbor" for complying with the equal opportunity provisions of the regulations, but that institutions are free to choose to comply with the other two tests.

45. In its 1996 Clarification, USDE stated that it will count athletes – not unfilled spots on teams – when it assesses the proportionality of participation opportunities: "OCR [*i.e.*, USDE's Office for Civil Rights] must, however, count actual athletes because participation opportunities must be real, not illusory."

46. The 1996 Clarification announces USDE's position on capping: "The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test." ("Capping" means placing an artificially low limit on the number of participants on a team to achieve gender proportionality across teams.)

47. No President or Attorney General has approved the 1996 Clarification pursuant to 20 U.S.C. § 1682 and Executive Order 12,250. *See* paragraphs 18-20, *supra.*

Effects of 1979 Policy Interpretation and 1996 Clarification

48. USDE's unlawful Title IX policies directly and indirectly have reduced (and continue to limit) participation opportunities for male athletes. USDE has initiated hundreds of administrative enforcement actions and investigations at institutions where athletic participation rates did not match enrollment rates by gender, but where no student had alleged discrimination. USDE has negotiated settlements with such institutions that reduced male participation opportunities. Likewise, seeking to avoid such USDE enforcement actions, institutions have limited male participation opportunities to comply with USDE's unlawful Title IX policies. As a direct and indirect result of USDE's unlawful Title IX policies, therefore, institutions have cut (*i.e.*, eliminated) hundreds of men's teams and have capped (*i.e.*, arbitrarily limited) hundreds of men's participation opportunities. *See, e.g.*, U.S. General Accounting Office, "Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams," at 18 (March 2001) (one third of institutions acknowledged cutting teams to comply with gender equity goals or requirements).

49. As the direct and indirect result of USDE's unlawful Title IX policies, under the euphemism "roster management," coaches and athletic directors – including individuals who are members of Plaintiff NWCA or of Plaintiff CSC's member organizations – have been forced to serve (and continue to be forced to serve) as the involuntary participants who implement USDE's unlawful Title IX policies by "capping" athletes solely to achieve the quotas established by USDE's unlawful Title IX rules.

50. By press release dated May 2, 2001, Bucknell announced that it would discontinue intercollegiate wrestling effective in the 2002-03 academic year to bring Bucknell into compliance with Title IX. The press release notes that, although Bucknell offers 14 men's teams and 14 women's teams, women comprise 48.7 percent of enrolled students, but only 41.9 percent of student-athletes. A companion Bucknell question-and-answer document cites Title IX's proportionality requirements as Bucknell's reason for eliminating the wrestling team.

51. On June 15, 2001, Marquette announced that it would discontinue the privately financed Marquette wrestling team in order to achieve compliance with USDE's Title IX policies. Marquette had cut the program's funding after the 1992-93 academic year. Between the 1993-94 and 2000-01 academic years, Plaintiff Marquette Wrestling had supported the Marquette wrestling program through its private fundraising efforts, without Marquette's financial support. At a Marquette Wrestling dinner commemorating the end of the 52-year history of Marquette's wrestling program, Marquette's athletic director indicated that Marquette might bring back its wrestling program if the legal requirements changed.

52. At the end of the 1990-91 academic year, Yale decided to demote its intercollegiate varsity wrestling team to "club" status, citing budgetary reasons. To avert this demotion, Yale Wrestling offered to endow the Yale wrestling program to allow wrestling to continue at Yale despite the budget cuts. On information and belief, Yale declined to accept the endowment because of Title IX.

53. The injunctive and declaratory relief requested in paragraph 99, *infra*, will redress the injuries alleged herein by eliminating the USDE's unlawful Title IX rules and thereby restoring the statute's protections against intentional gender-conscious discrimination, 20 U.S.C. § 1681, and the regulations' requirement that institutions provide equal opportunity (not equal participation) based on interest and abilities (not enrollment). 45 C.F.R. § 86.41(c)(1).

USDE'S 1996 CLARIFICATION RENDERS THE 1979 POLICY INTERPRETATION SUBJECT TO RENEWED JUDICIAL REVIEW

54. As set forth more fully below, USDE's 1996 Clarification constitutes final agency action reviewable under the APA and Title IX. Plaintiffs file this action within the six-year default statute of limitations for challenging certain actions by the United States government. 28 U.S.C. § 2401(a) (2001).

55. An agency "re-opens" a rule to challenge by changing its interpretation of that rule. An agency "constructively re-opens" an administrative action previously closed to judicial review when a subsequent action "changes the stakes" of the earlier action.

56. USDE's 1996 Clarification declares that the Three-Part Test provides a "safe harbor," under which institutions lawfully may cut or cap men's teams to achieve gender proportionality with enrollment rates, notwithstanding that the 1979 Policy Interpretation included an "Overall Determination of Compliance" prohibiting actions that are "discriminatory in language or effect." By authorizing institutions to use the Three-Part Test as a "safe harbor" for Title IX compliance, even to the point of violating the Overall Determination of Compliance, the Constitution, Title IX, and the implementing regulations, USDE's 1996 Clarification revealed an aspect of the Three-Part Test that was unforeseeable in 1979, thereby reopening the 1979 Policy Interpretation to judicial review.

57. Although the Three-Part Test in the 1979 Policy Interpretation refers to "participation opportunities," USDE's 1996 Clarification declares that institutions must compare the gender ratio of "participants" when seeking to demonstrate gender proportionality under the Three-Part Test. Accordingly, USDE's 1996 Clarification revealed an aspect of the Three-Part Test that was unforeseeable in 1979, thereby reopening the 1979 Policy Interpretation to judicial review.

58. By its terms, the 1979 Policy Interpretations applies the Three-Part Test as a framework for resolving complaints pending before HEW more than twenty years ago. The 1996 Clarification adopts the Three-Part Test as the regulatory framework for all prospective Title IX compliance, thereby reopening the Three-Part Test for judicial review.

I.
USDE'S TITLE IX RULES UNLAWFULLY ESTABLISH A DISPARATE-IMPACT STANDARD AND UNLAWFULLY AUTHORIZE INTENTIONAL DISCRIMINATION

59. Plaintiffs incorporate paragraphs 1 through 58 as if fully set forth herein.

60. Title IX prohibits only intentional discrimination.

61. As a federal department empowered to extend federal financial assistance to educational programs and activities, USDE has a nondiscretionary duty to promulgate rules to effectuate Title IX's prohibition of intentional gender discrimination. 20 U.S.C. § 1682.

62. Title IX does not authorize USDE to create (by rule) a disparate-impact standard. Consequently, Title IX necessarily does not authorize USDE to issue a rule authorizing institutions to engage in intentional gender discrimination – such as gender-conscious cutting or capping – to achieve compliance with a disparate-impact standard.

63. Capping a male athlete off a team or cutting an entire men's team solely because not enough female students have an interest in athletics is gender discrimination *per se* – with absolutely no corresponding benefit to women – in violation of the Equal Protection Clause of the Fourteenth Amendment, the Equal Protection component of the Due Process Clause, Title IX, and Title IX's implementing regulations.

64. USDE failed to identify any "important government objective" served by gender-conscious cutting

and capping solely to bring athletic participation into proportion with enrollment rates.

65. The Three-Part Test violates Title IX, the implementing regulations, and the Equal Protection component of the Due Process Clause by requiring institutions to discriminate against male student-athletes in one or more of the following ways:

(a) allocate athletic opportunities based on enrollment, which (at schools where men are more interested in athletics than are women) provides men with fewer athletic opportunities than it provides to women, vis-à-vis the genders' respective athletic interest;

(b) continually expand athletic opportunities for women far beyond the level of opportunities provided to men, vis-à-vis the genders' respective athletic interest; and/or

(c) "fully" accommodate the athletic interests of women notwithstanding that the institutions does not also fully accommodate the athletic interests of men.

66. For the foregoing reasons, the Three-Part Test and the 1996 Clarification violate Title IX, the implementing regulations, and the U.S. Constitution.

II.
THE "THREE-PART TEST" UNLAWFULLY BASES COMPLIANCE ON ENROLLMENT RATHER THAN ATHLETIC INTEREST

67. Plaintiffs incorporate paragraphs 1 through 58 and paragraphs 59 through 66 as if fully set forth herein.

68. Notwithstanding that Title IX incorporates anti-quota language in 20 U.S.C. § 1681(b), and that the Title IX regulations require institutions to assess students' athletic interests "by a reasonable method [the institution] deems

appropriate" and to provide equal athletic opportunity, USDE's Three-Part Test uses enrollment as the measure of student interest.

69. When otherwise allowed by law, a disparate-impact analysis requires comparison with the qualified applicant pool, not the general population. Assuming for the sake of argument that USDE has authority to establish a regulatory disparate-impact standard, USDE must assess such impacts by comparing athletic opportunities to the students actually interested in participating in athletics, not to all enrolled students.

70. For the foregoing reasons, the Three-Part Test and the 1996 Clarification violate Title IX, the implementing regulations, and the U.S. Constitution.

III.
USDE UNLAWFULLY DENIED PETITIONS TO AMEND OR REPEAL THE "THREE-PART TEST"

71. Plaintiffs incorporate paragraphs 1 through 58, paragraphs 59 through 66, and paragraphs 67 through 70 as if fully set forth herein.

72. The APA authorizes any interested person to petition an agency to adopt, amend, or repeal a rule. 5 U.S.C. § 553(e).

73. USDE's 1996 Clarification acknowledges that many commenters requested USDE to amend or repeal the Three-Part Test because the Three-Part Test exceeds the intent of Title IX.

74. On October 20, 1995, Plaintiff NWCA petitioned USDE to amend or repeal the Three-Part Test because the test violates the rights of male athletes under Title IX and the Constitution.

75. On October 20, 1995, Plaintiff NWCA petitioned USDE to amend or repeal the Three-Part Test to address the changed circumstances between the 1970s and the 1990s. Specifically, NWCA commented that women's athletic participation and enrollment ratios had increased from approximately 10% and 40%, respectively, in the early 1970's to approximately 40% and 55% percent in 1995. NWCA further commented that male students' higher athletic interest - particularly that of "walk-on" athletes - explained the apparent disparity in 1995 where men (45% of enrollment) provided 60% of all athletes, whereas women (55% of enrollment) provided 40% of all athletes.

76. USDE's January 16, 1996 Clarification summarily denied these petitions. *See* letter from Norma V. Cantú, at 1 ("it would not be appropriate to revise the 1979 Policy Interpretation").

77. For the foregoing reasons, by expressly denying petitions to amend or repeal the Three-Part Test, USDE's 1996 Clarification constitutes final agency action that is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

IV.

USDE'S GENDER PROPORTIONALITY RULES UNLAWFULLY ABDICATE ITS STATUTORY DUTY TO PREVENT INTENTIONAL GENDER DISCRIMINATION

78. Plaintiffs incorporate paragraphs 1 through 58, paragraphs 59 through 66, paragraphs 67 through 70, and paragraphs 71 through 77 as if fully set forth herein.

79. USDE's failure to enforce Title IX's prohibition of intentional discrimination against institutions that engage in intentional discrimination, such as gender-

conscious cutting and capping, is final agency action made reviewable under 20 U.S.C. § 1683 and 5 U.S.C. § 706.

80. Individual members of Plaintiff NWCA and of Plaintiff CSC's member organizations who serve as athletic directors and coaches must engage in intentional discrimination (gender-conscious cutting and capping) in violation of Title IX in order to comply with USDE's disparate-impact standard (the Three-Part Test) and with USDE-negotiated settlements. Because these individuals cannot sue themselves, they lack an adequate remedy to challenge such final agency action.

81. By countenancing gender-conscious capping and cuts by recipients of federal funds, including gender-conscious capping and cutting in settlements to USDE-initiated investigations, and issuing its 1996 Clarification, USDE has "consciously and expressly adopted a general policy" that abdicates its statutory duties under Title IX.

V.

USDE'S TITLE IX RULES ARE NOT IN EFFECT

82. Plaintiffs incorporate paragraphs 1 through 58, paragraphs 59 through 66, paragraphs 67 through 70, paragraphs 71 through 77, and paragraphs 78 through 81 as if fully set forth herein.

83. Under 20 U.S.C. § 1682 and Executive Order 12,250, no rule, regulation, or order of general applicability issued by a federal agency under Title IX takes effect until approved by either the President (before November 2, 1980) or the Attorney General (after November 2, 1980) and such approval is published in the *Federal Register.*

84. No President or Attorney General has approved the 1979 Policy Interpretation, the USDE's implementing regulations, 34 C.F.R. § 106.1-.71, or the 1996

Clarification pursuant to 20 U.S.C. § 1682 and Executive Order 12,250.

85. For the foregoing reasons, the 1979 Policy Interpretation, the USDE's implementing regulations, 34 C.F.R. § 106.1-.71, and the 1996 Clarification have no force or effect.

VI.
AS AN INTERPRETIVE RULE PURPORTING TO AMEND A SUBSTANTIVE RULE, THE THREE-PART TEST IS NULL AND VOID

86. Plaintiffs incorporate paragraphs 1 through 58, paragraphs 59 through 66, paragraphs 67 through 70, paragraphs 71 through 77, paragraphs 78 through 81, and paragraphs 82 through 85 as if fully set forth herein.

87. The APA defines "rule" broadly as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4).

88. Before an agency lawfully can issue a rule, the APA requires the agency to publish a notice of proposed rulemaking in the *Federal Register* and to provide an opportunity to comment. 5 U.S.C. § 553(b)-(c). Such rules are known as "substantive rules."

89. The APA exempts "interpretative rules, general statements of policy, or rules of agency . . . practice" from the notice-and-comment rulemaking requirement. 5 U.S.C. § 553(b)(A). Such rules are known (collectively) as "interpretive rules."

90. When an agency's purportedly interpretive rule (a) creates the basis either for enforcement action or for agency action to confer benefits, or (b) effectively amends a

prior substantive rule or regulatory interpretation, the purportedly interpretive rule constitutes a substantive rule and thus requires notice-and-comment rulemaking.

91. HEW's 1979 Policy Interpretation is an interpretive rule that creates the Three-Part Test as an interpretation of the discretionary "other factors" under 45 C.F.R. § 86.41(c) that HEW will consider above and beyond the factors specifically enumerated at 45 C.F.R. § 86.41(c)(1)-(10).

92. The APA prohibits agencies from using an interpretive rule to add specific new regulatory factors to an existing substantive rule's enumeration of regulatory factors, notwithstanding that the substantive rule allows the agency to consider "other factors" on a case-by-case basis.

93. For the foregoing reasons, the Three-Part Test in HEW's 1979 Policy Interpretation is arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with the law and was issued without observance of procedure required by law.

VII.
AS AN INTERPRETIVE RULE PURPORTING TO AMEND A SUBSTANTIVE RULE AND PRIOR REGULATORY INTERPRETATION, THE 1996 CLARIFICATION IS NULL AND VOID

94. Plaintiffs incorporate paragraphs 1 through 58, paragraphs 59 through 66, paragraphs 67 through 70, paragraphs 71 through 77, paragraphs 78 through 81, paragraphs 82 through 85, and paragraphs 86 through 93 as if fully set forth herein.

95. The 1979 Policy Interpretation's Three-Part Test asks, in part, whether an institution provides intercollegiate "participation opportunities" in numbers

substantially proportionate to enrollment. In its 1996 Clarification, USDE amended the 1979 Policy Interpretation from counting available "participation opportunities" (*i.e., spots* on a team) to counting "participants" (*i.e., athletes* on a team) when determining whether an institution complies with the gender-proportionality prong of the Three-Part Test.

96. Under the 1979 Policy Interpretation, both the Overall Determination of Compliance and the Three-Part Test apply to assess an institution's compliance status. Accordingly, the 1979 Policy Interpretation required institutions to avoid policies that are "discriminatory in language or effect" under the Overall Determination of Compliance when complying with the Three-Part Test. Notwithstanding the Overall Determination of Compliance, Title IX's prohibition of discrimination, and the Due Process Clause's Equal Protection component, USDE's 1996 Clarification expressly authorizes placing an arbitrary cap on men's teams or cutting men's teams solely to achieve gender proportionality under the Three-Part Test, thereby amending the Overall Determination of Compliance.

97. As set forth in paragraph 58, *supra*, by its original terms, the Three-Part Test did not apply prospectively to institutions' future compliance, but instead only served as HEW's framework for resolving the nearly 100 complaints pending before the Department in 1979. By applying the Three-Part Test from its 1979 Policy Interpretation to address Title IX compliance in 1996 (and prospectively thereafter), USDE amended the 1979 Policy Interpretation and the implementing Title IX regulations.

98. For the foregoing reasons, USDE's 1996 Clarification changed the underlying Title IX rules without

the required notice-and-comment rulemaking and thus is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law and without observance of the procedures required by law.

PRAYER FOR RELIEF

99. WHEREFORE, Plaintiffs respectfully request that this Court enter the following relief:

A. Pursuant to 28 U.S.C. §§ 2201-2202, 5 U.S.C. § 706(2), and Fed. R. Civ. Proc. 57, Declaratory Judgment that:

1. Title IX only authorizes rules that effectuate Title IX's prohibition of intentional discrimination and does not authorize rules that create a disparate-impact standard as a surrogate for intentional discrimination;
2. Title IX and the Equal Protection component of the Due Process Clause prohibit USDE from requiring or authorizing institutions to engage in gender-conscious cutting or capping to meet a disparate-impact standard;
3. To the extent that institutions may make gender-conscious decisions regarding athletic opportunities, Title IX, the Title IX regulations, and the Equal Protection component of the Due Process Clause require institutions to use athletic interest and ability – not enrollment – as the relevant population;
4. Under Title IX, the Title IX regulations, and the Equal Protection component of the Due Process Clause, the relevant unit of "athletic

opportunity" is a spot on a team, not an athlete on a team;

5. UDSE unlawfully denied petitions filed by NWCA and others to amend or repeal USDE's unlawful Title IX rules;

6. USDE unlawfully denied petitions filed by NWCA and others to revise its 1979-era enforcement policy to address the manifestly changed circumstances in 1996;

7. In its 1996 Clarification, USDE "consciously and expressly adopted a general policy" that abdicates its statutory duty to prevent intentional gender discrimination;

8. The 1979 Policy Interpretation, USDE's implementing regulations, 34 C.F.R. § 106.1-.71, and the 1996 Clarification have no force or effect under 20 U.S.C. § 1682 and Executive Order 12,250;

9. HEW's promulgation of the Three-Part Test as an interpretive rule purported to amend the substantive Title IX regulations in violation of the APA's rulemaking requirements, thus rendering the Three-Part Test null and void; and

10. USDE's promulgation of the 1996 Clarification as an interpretive rule purported to amend the substantive Title IX regulations in violation of the APA's rulemaking requirements, thus rendering the 1996 Clarification null and void.

B. Pursuant to 28 U.S.C. § 2202 and 5 U.S.C. § 706(2), an Order that

1. USDE's 1996 Clarification is vacated in its entirety as arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, and promulgated without observing the procedures required by law;
2. The Three-Part Test is vacated as arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, and promulgated without observing the procedures required by law;
3. USDE's Title IX rules on athletics are remanded to USDE with instructions that - in accordance with a schedule set by this Court - USDE commence notice-and-comment rulemaking to amend those rules consistent with Title IX, the U.S. Constitution, and this Court's declaratory relief in this action;
4. This Court shall retain jurisdiction over this matter until such rules are lawfully promulgated pursuant to the APA and become effective pursuant to 20 U.S.C. § 1682; and
5. All disparate-impact components of USDE's Title IX rules concerning athletics are stayed until USDE promulgates a final rule pursuant to this Court's order and such rules become effective pursuant to 20 U.S.C. § 1682.

C. Pursuant to 42 U.S.C. § 1988(b) (1994) and 28 U.S.C. § 2412 (1994), award Plaintiffs their costs, including attorneys fees.

D. Such other relief as may be just and proper.

Dated: May 14, 2002 Respectfully submitted,

Lawrence J. Joseph, D.C. Bar No. 464777
Robert A. Matthews, D.C. Bar No. 431944

McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 496-7500
Telecopier: (202) 496-7756

Attorneys for Plaintiffs National Wrestling Coaches Association, Committee to Save Bucknell Wrestling, Marquette Wrestling Club, Yale Wrestling Association, and College Sports Council

(5)

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No. 04-922

In the Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION, ET AL., PETITIONERS

v.

DEPARTMENT OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MARK B. STERN
THOMAS M. BONDY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KENT D. TALBERT
Acting General Counsel
Department of Education
Washington, D.C.

QUESTIONS PRESENTED

1. Whether petitioners' allegations failed to satisfy the redressability requirement for Article III standing.

2. Whether petitioners had another "adequate remedy," precluding judicial review under 5 U.S.C. 704.

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No. 04-922

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DEPARTMENT OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 90a-142a) is reported at 366 F.3d 930. A supplemental opinion of the court of appeals (Pet. App. 145a-153a) is reported at 383 F.3d 1047. The memorandum opinion of the district court (Pet. App. 1a-88a) is reported at 263 F. Supp. 2d 82.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2004. A petition for rehearing was denied on October 8, 2004 (Pet. App. 143a-144a). The petition for a writ of certiorari was filed on January 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). Institutions that engage in prohibited discrimination may have their federal funding terminated. 20 U.S.C. 1682. An institution whose federal funding is terminated may obtain judicial review of the termination decision. 20 U.S.C. 1683.

Title IX states that "[n]othing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C. 1681(b). That interpretive rule is subject to the following proviso: "*Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." 20 U.S.C. 1681(b).

In 1975, following notice and comment, the Department of Health, Education, and Welfare (HEW) issued regulations under Title IX. Those regulations provide

that a recipient "shall provide equal athletic opportunity for members of both sexes." The regulations further provide that, "[i]n determining whether equal opportunities are available the [agency] will consider, among other factors, * * * [w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. 106.41(c)(1); 45 C.F.R. 86.41(c)(1). After responsibility for enforcing Title IX was transferred to the United States Department of Education, it recodified HEW's regulations without substantial change. See 45 Fed. Reg. 30,962 (1980).

In 1979, HEW adopted a policy interpretation that provided a three-part test for evaluating an institution's compliance with Title IX and HEW's regulations. Under the three-part test, an institution could demonstrate compliance in the context of athletic programs if it satisfied any one of the following prongs:

> (1) * * * intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) [w]here the members of one sex have been and are underrepresented among intercollegiate athletes, * * * the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) [w]here the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing

> practice of program expansion such as that cited above, * * * it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Pet. App. 94a-95a (quoting 44 Fed. Reg. 71,418 (1979)).

In 1996, the Department of Education clarified the 1979 Policy Interpretation. Pet. App. 173a-197a. The 1996 Clarification stated that it was not intended as a revision of the 1979 Policy Interpretation, but rather was prompted by continuing "requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics." *Id.* at 173a.

The 1996 Clarification emphasized three points. First, "[t]he Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes." Pet. App. 175a. Second, "the Clarification does not provide strict numerical formulas or 'cookie-cutter' answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law." *Id.* at 175a-176a. Third, the Clarification noted that there appeared to be some "confusion about the elimination and capping of men's teams in the context of Title IX compliance." *Id.* at 178a. The Clarification responded that "[t]he rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarifica-

tion requires that an institution cap or eliminate participation opportunities for men." *Ibid.*

2. Petitioners are several membership organizations representing the interests of collegiate men's wrestling coaches, athletes, and alumni. Pet. App. 96a. They filed suit against the Department of Education, alleging that some colleges have eliminated or reduced the size of their men's wrestling program, and that the Department of Education's enforcement policies are responsible for those actions. *Ibid.* Petitioners did not challenge either Title IX or the 1975 regulations. *Ibid.* Petitioners instead alleged that the three-part test incorporated in the 1979 Policy Interpretation and 1996 Clarification violate the equal protection component of the Fifth Amendment and Title IX. *Ibid.*

The district court granted the government's motion to dismiss for lack of Article III standing. Pet. App. 1a-88a. The court held that petitioners had not asserted any injury that would be redressed by the relief they sought. *Id.* at 53a. The district court emphasized that its ruling did not preclude judicial review of the actions of an institution that receives federal funding. Relying on *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), the court held that a person subjected to discrimination on the basis of sex by a federally funded institution may seek relief against that institution under Title IX. Pet. App. 80a.

3. The court of appeals affirmed. Pet. App. 90a-122a. The court of appeals held that petitioners lack standing under Article III because they have not sufficiently alleged that their injuries would be redressed by the relief they request. *Id.* at 98a. The court concluded that while petitioners had asserted as their injury the loss of wrestling opportunities for male students, they offered

"nothing but speculation" that invalidating the 1979 Policy Interpretation and the 1996 Clarification would alter the "independent decisions" of educational institutions to eliminate or reduce the size of their male wrestling teams. *Id.* at 98a, 103a.

The court of appeals explained why petitioners' allegations amounted to nothing more than speculation. First, "nothing in the Three-Part Test requires schools to eliminate or cap men's wrestling or any other athletic program." Pet. App. 103a. Second, even if petitioners prevailed in their challenge to the 1979 Policy and the 1996 Clarification, "the 1975 Regulations would still be in place," and "[f]ederally funded schools would still be required to provide athletic opportunities in a manner that equally accommodated both genders." *Id.* at 104a. For that reason, "[s]chools would remain free to eliminate or cap men's wrestling teams and may in some circumstances feel compelled to do so." *Ibid.* That is particularly true, because "Title IX itself permits evidence of disproportion in the distribution of benefits between sexes to be considered in enforcement proceedings against recipients of federal funding." *Ibid.* Third, "other reasons unrelated to the challenged legal requirements may continue to motivate the schools to take such actions." *Ibid.* Finally, the challenged polices "are interpretive guidelines that the Department was not obligated to issue in the first place," and petitioners had provided "no basis for the notion that the Department would be required to replace the challenged policies with anything new," were the court to invalidate the existing policies. *Ibid.* In those circumstances, the court concluded that petitioners' "attempts to show redressability are based on nothing but 'unadorned speculation.'" *Id.*

at 112a (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)).

The court of appeals further held that even if petitioners had standing, "the availability of a private cause of action directly against universities that discriminate in violation of Title IX constitutes an adequate remedy that bars [petitioners'] case." Pet. App. 115a. The court relied on the provision in the Administrative Procedure Act (APA) that specifies that agency action is subject to review only when it is either "made reviewable by statute," or when "there is no other adequate remedy in a court." 5 U.S.C. 704. The court explained that there is no statute that makes the Department of Education's actions reviewable, and that a private right of action against the universities is another adequate remedy. Pet. App. 115a-117a.

Judge Williams dissented. Judge Williams concluded that petitioners had adequately alleged standing and that there was not another adequate remedy. See Pet. App. 123a-142a.

The court of appeals issued a supplemental opinion denying rehearing. Pet. App. 143a-147a. Judge Williams dissented from the denial of rehearing. *Id.* at 148a-153a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 10-19) that the court of appeals erred in holding that they lack standing under Article III. That contention is without merit. Applying settled principles of Article III standing to the circum-

stances of this case, the court of appeals correctly concluded that petitioners failed to satisfy the redressability component of Article III standing.

To establish standing under Article III, a plaintiff must allege an injury in fact that is fairly traceable to the challenged government action and that is "likely" to be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Mere "speculation" that the alleged injury will be redressed by a favorable decision is insufficient to establish Article III standing. *Id.* at 561. Petitioners claim as the source of their injury that some colleges and universities have eliminated or reduced the size of their male wrestling teams. But petitioners have not sued any of the allegedly offending educational institutions under Title IX or any other source of law. Instead, they have sued the United States Department of Education, claiming that the Department's Title IX enforcement policies against the universities and colleges are responsible for their alleged injury.

Because petitioners' alleged injury arises from the government's regulation of a third party not before the Court, the redressability component of standing is "'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)). In that context, standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ibid.* (quoting *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989)), "and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to * * * permit redressability of injury." *Ibid.*

The Court's decision in *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), illustrates the difficulty of making that showing. In *Simon*, organizations representing low income persons denied access to nonprofit hospitals challenged an Internal Revenue Service ruling that allowed favorable tax treatment to nonprofit hospitals that offered only emergency care to indigent persons. The Court held that the plaintiffs lacked standing to challenge the IRS's ruling because it was speculative whether a decision withholding tax exempt status from hospitals that failed to provide non-emergency service to indigent persons would cause the hospitals to provide such service. *Id.* at 43. Similarly, in *Allen* v. *Wright*, 468 U.S. 737 (1984), the Court held that parents of black public school children lacked standing to challenge the IRS's failure to withdraw tax exempt status from racially discriminatory schools. The Court concluded that it was entirely speculative whether withdrawal of a tax exemption would lead the school to change its policies. *Id.* at 739-740.

Petitioners failed to sufficiently allege standing under those decisions. As the court of appeals concluded, petitioners failed to show that there is a "substantial probability" (*Warth* v. *Seldin*, 422 U.S. 490, 504 (1975)), that a decision invalidating the 1979 Policy and the 1996 Clarification would likely lead universities and colleges to alter their independent decisions to eliminate or reduce the size of men's wrestling programs.

Several considerations support that conclusion. First, nothing in the 1979 Policy Interpretation or the 1996 Clarification requires institutions to eliminate or reduce the size of male sports teams or to adopt any one approach to compliance. They allow universities and

colleges to select their own preferred method of compliance.

Second, even if the 1979 Policy Interpretation and the 1996 Clarification did not exist, Title IX regulations that petitioners have not challenged would still require universities that receive federal funds to select sports in such a way as to "effectively accommodate the interests and abilities of members of both sexes." 45 C.F.R. 86.41(c)(1); 34 C.F.R. 106.41(c)(1). In order to satisfy that unchallenged obligation, universities may choose to eliminate or cap men's sport's teams, just as they have done in the past. That is particularly true because Title IX expressly permits the Department of Education to consider as relevant evidence of a Title IX violation that an "imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." 20 U.S.C. 1681(b).

Third, a college or university may choose to eliminate or reduce the roster size of particular athletic squads for any number of reasons wholly unrelated to Title IX. Such factors could include budgetary constraints, inadequate facilities, insufficient spectator interest, or the lack of suitable competition. In this respect, the failure of the colleges and institutions themselves to mount a similar challenge suggests that Title IX and the policy statements are not the sole factors contributing to changes in athletic programs. Finally, the 1979 Policy Interpretation and the 1996 Clarification are interpretive guidelines that the Department was not obligated to issue, and petitioners have not suggested any basis for requiring the Department to replace those policies with anything new that would affect the independent decisions of colleges and universities.

Petitioners failed to adduce anything substantial to counter those considerations. As the court of appeals observed, for example, petitioners "do not suggest that any particular school necessarily would forego elimination of a wrestling team or reinstate a previously disbanded program" in the absence of the agency guidance they challenge, except to say that a school "might" do so. Pet. App. 103a. Rather, as the court of appeals further explained, petitioners offered "nothing but unadorned speculation to suggest that the schools covered by Title IX would change their decisions if appellants were to prevail in this case." *Id.* at 110a-111a. In these circumstances, the court of appeals correctly concluded that petitioners failed to satisfy the redressability element of Article III standing. In any event, that case-specific and fact-bound question does not warrant review.

2. Petitioners next contend (Pet. 19-30) that the court of appeals erred in holding that review is unavailable under 5 U.S.C. 704. Because petitioners lack standing, however, that question is not properly presented here. For that reason alone, review of that question is not warranted.

Even if that issue were properly presented, it would not warrant review. The APA provides for judicial review of agency action that is "made reviewable by statute" and final agency action "for which there is no other adequate remedy in a court." 5 U.S.C. 704. As the court of appeals concluded, neither of those grounds for review is available here.

First, this is not a case in which "there is no other adequate remedy in a court." 5 U.S.C. 704. Under *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), petitioners have a private right of action against colleges and universities that engage in discrimination in viola-

tion of Title IX, and because petitioners challenge the 1979 Policy Interpretation and the 1996 Clarification on the ground that they violate the Equal Protection Clause and Title IX itself, that right of action is an "adequate remedy" for the discrimination alleged by petitioners here. The D.C. Circuit has repeatedly reached that conclusion in analogous contexts. See *Washington Legal Found.* v. *Alexander*, 984 F.2d 483 (D.C. Cir. 1993); *Women's Equity Action League (WEAL)* v. *Cavazos*, 906 F.2d 742 (D.C. Cir. 1990); *Council of & for the Blind* v. *Regan*, 709 F.2d 1521 (D.C. Cir. 1983) (en banc).

Nor is this a case in which agency action is "made reviewable by statute." 5 U.S.C. 704. In arguing otherwise, petitioners rely (Pet. 19) on 20 U.S.C. 1683, which provides that agency action under Title IX "shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." As the court of appeals explained, however, "the reference to agency actions 'made reviewable by statute' in § 704 relates to statutory provisions *other than the APA* that govern judicial review of those actions." Pet. App. 117a. Section 1683 is not such a statute. Instead, it contemplates review under the APA when there is no other adequate remedy, a precondition that petitioners have failed to satisfy.

Petitioners similarly err in arguing (Pet. 22-25) that they can circumvent the APA's judicial review provisions by adding as defendants the Secretary and Assistant Secretary of Education in their official capacities. See Pet. 22. In the context of a suit challenging action taken by an administrative agency, a suit against a government officer in his official capacity is simply "another

way of pleading an action against an entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). Accordingly, in the context of this case, a suit against the Secretary and the Assistant Secretary is simply another way of suing the Department of Education. As such, such a suit is subject to the limitations for review of agency action set forth in 5 U.S.C. 704. Where, as here, there is another adequate remedy, such a suit may not be brought.

Finally, petitioners assert (26-30) that a private right of action against recipients that discriminate is not an adequate remedy. But after careful consideration of that issue, the court of appeals concluded otherwise, Pet. App. 118a-119a, and that fact-bound conclusion does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
MARK B. STERN
THOMAS M. BONDY
Attorneys

KENT D. TALBERT
Acting General Counsel
Department of Education

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NATIONAL WRESTLING COACHES ASSOCIATION,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
MARQUETTE WRESTLING CLUB,
YALE WRESTLING ASSOCIATION, AND
COLLEGE SPORTS COUNCIL,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION,

RESPONDENT

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

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PETITIONERS' REPLY BRIEF

The Department argues that petitioners lack standing and a remedy against it. Before the federal merger of law and equity, the Administrative Procedure Act ("APA"), and its 1976 amendments, however, this Court held that "[w]ant of right and want of remedy are justly said to be reciprocal" so that "[w]here... there has been a violation of a right, the person injured is entitled to an action." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Much has happened since 1938, but nothing has changed: petitioners would have had both a right and a remedy then, and they have both now.

I. PETITIONERS HAVE STANDING

A. Third-Party Tax Cases Are Inapposite. On standing, the Department relies on *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), *Warth v. Seldin*, 422 U.S. 490 (1975), and *Allen v. Wright*, 468 U.S. 737 (1984). Opp'n. at 8-9. Unlike petitioners here, however, the *Simon-Warth-Allen* plaintiffs lacked procedural and unequal-footing injuries. Thus, unlike petitioners here, they could not argue that an order that required the proper procedure or restored equal footing would redress their injuries. *See* Pet. at 17-19 (procedural rights); *id.* at 14-17 (unequal footing). As such, the Department would misplace its reliance on *Simon*, *Warth*, and *Allen*, even if petitioners' procedural-rights and unequal-footing cases did not *post-date* those decisions. Further, as even *Simon* recognizes, privately inflicted injury is traceable to government action if the injurious conduct "would have been illegal without that action." 426 U.S. at 45 n.25. But the *Simon-Warth-Allen* plaintiffs did not allege that the government actions challenged there authorized conduct (*i.e.*, charging hospital fees, exclusionary private schools, residential zoning) that otherwise would be illegal.

The next three sections will establish redressability under the procedural-rights, unequal-footing, and otherwise-illegal theories of standing. Two additional aspects of the Department's *Simon-Warth-Allen* argument warrant rebuttal.

1. The Department argues that schools are "independent actors not before the court[]" that make "unfettered choices" in the "exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." Opp'n. at 8.

That argument is inapposite to "injury produced by determinative or coercive effect upon the action of someone else," Pet. at 13 (*quoting Bennett v Spear*, 520 U.S. 154, 169 (1997)), and for four specific reasons. *First*, given the large number of schools with main or satellite campuses resident in the District, petitioners could hale members' schools into court, if relevant to standing.[1] *Second*, schools are not "unfettered" in acquiescing to the Department's substantively and procedurally unlawful conditions on federal funding. *Id.* at 2-6. *Third*, gender-conscious cuts and caps[2] are not "legitimate" for schools not adjudged to have intentionally discriminated against women athletes. *Id.* at 12-13. *Fourth*, schools' actions are entirely predictable: they will do what they must to qualify for federal funds. Pet. at 15-16. If petitioners prevail and schools persist, petitioners gladly will file complaints against schools under the new regulatory regime, *see Brock*, 477 U.S. at 284 (standing to challenge federal guidelines that govern federal benefit programs), which will work quickly on most schools. U.S. Dep't of Educ., Office for Civil Rights, *Annual Report to Congress: Fiscal Year 2003*, 21 (Dec. 2004) (91% of complaints resolved in 180 days). If schools persist,

2. The Department argues that petitioners must estab-

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[1] The district court denied leave to file an amended complaint in part because of its *sua sponte* argument (not briefed by the parties) that school members were indispensable parties, FED. R. CIV. P. 19, thereby failing the third prong of the associational-standing inquiry, which that court considered a jurisdictional failure to meet Article III standing. App. 77a. *But see Int'l Union v. Brock*, 477 U.S. 274, 287 (1986) (purely legal questions do not require members' participation); *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551-52, 555-56 (1996) ("associational standing test's third prong is a prudential one").

[2] In addition to *cutting* teams, the Three-Part Test has led to *capping* men's team by limiting teams below the coach's otherwise-optimal size to comply with proportionality. App. 252a (¶ 29). Capping affects members generally, *id.*, and specific members, *id.* 274a (¶ 61). Although pleadings alone should suffice, the Department implicitly acknowledges that capping occurs, App. 178a, and indeed capping of men's teams is endemic in college sports. *See* Bill Pennington, *Want to Try Out for College Sports? Forget It*, N.Y. TIMES, Sept. 22, 2002, A1.

lish a "substantial probability" that their prevailing "would likely lead universities... to alter their independent decisions to eliminate or reduce the size of men's wrestling programs." Opp'n. at 9. Even outside the procedural-rights, unequal-footing, and otherwise-illegal contexts, this simply is not the law. *See Pub. Citizen v U.S. Dep't of Justice*, 491 U.S. 440, 451 (1989) ("appellants *might gain significant relief* if they prevail in their suit [and their] *potential gains* are undoubtedly sufficient to give them standing") (emphasis added); *Utah v. Evans*, 536 U.S. 452, 464 (2002) (a "*significant increase in the likelihood* that the plaintiff would obtain relief" from third parties satisfies redressability for an indirect injury) (emphasis added); Pet. at 16-17. The requested relief must have the *potential* to improve petitioners' lot in a significant way. It need not be a sure bet. Moving the equal-opportunity fulcrum from enrollment back to interest would significantly benefit male athletes. *See* n.4, *infra;* Pet. at 15.

1. Procedural Rights. Petitioners allege injury from three procedural violations: failing to follow § 902's presidential-approval requirement, 20 U.S.C. § 1682; voiding the regulatory requirement to assess and consider men's interests, *see* Pet. at 4-6; and amending the regulations without notice-and-comment rulemaking, *id.;* 5 U.S.C. § 553. Petitioners have standing to challenge the denial of required procedures, and that injury remains "fairly traceable" to the procedural violation, notwithstanding that the entity may reach the same result under the proper procedure. Pet. at 17-18 (*citing FEC v. Akins*, 524 U.S. 11, 25 (1998)). Because these procedures are designed "to protect [their] concrete interests," petitioners "can assert th[ese] right[s] without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 & n.7 (1992).

2. Unequal Footing. Under the regulations and cases, Pet. 2-4, the "applicant pool" for intercollegiate athletics consists of those ready and able to compete, based on interest and ability, not all students. *Id.* at 15. The Department's enrollment standard puts male athletes on an unequal footing vis-à-vis female athletes, and restoring the interest-based

standard would redress that injury. *Id.*; *Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) (rejects majority's view that indirect-injury plaintiffs cannot assert unequal-footing injuries); Pets.' Suppl. Br. at 7-8.[3] Because men are more interested in competitive athletics,[4] the Three-Part Test is not neutral as applied. *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66-67 (2003) (need not decide at threshold stage whether classification is prohibited as "but proxy for differential treatment" or because it discriminates in practice); *United Auto. Workers v. Johnson Controls*, 499 U.S. 187, 199 (1991).

3. Otherwise-Illegal Conduct. By allowing gender-conscious cuts and caps solely to meet an enrollment quota, App. 178a ("The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test."), without past discrimination, the Department authorizes otherwise-illegal conduct in an overbroad rule that petitioners have standing to challenge facially and as applied. *Civil Rights Cases*, 109 U.S. 3, 14 (1883) (invalidating remedial measure not tied to

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[3] Of the Department's cases, only *Allen* genuinely raises equal-protection issues. Because the plaintiffs wanted an integrated public school, not access to the exclusionary private schools, Pet. at 17 n.11, however, they had to (and did not) establish that (1) absent favorable tax treatment, the schools' funding to decline; (2) the decline would cause the schools either to raise tuition or lower services; (3) increased tuition or lowered services would cause students to leave; (4) the children would enroll in public school rather than move or find another private school. Here, by contrast, Title IX prohibits discrimination by federal recipients, and petitioners can establish that schools would not forego federal funds. *Id.* at 15-16.

[4] Using the aggregate data for schools in the National Collegiate Athletic Association's Division III (which has no scholarships and thus involves participation for its own sake), a school that fields teams in gender-reciprocal sports (baseball-softball, basketball, cross country, golf, gymnastics, hockey, lacrosse, soccer, swimming, tennis, and track), but not in traditionally single-gender sports (field hockey, football, volleyball, and wrestling) would have 183.3 women (44.8%) and 225.8 men (55.2%) in its athletic department, assuming that the 34.7 displaced women (field hockey and volleyball) and 108.9 displaced men (football and wrestling) did not go out for another sport. *See Amici Curiae* Br. of Nat'l Women's L. Ctr. *et al.*, Ex. 12, at 158, 162, No. 02-0072 (D.D.C.).

prior equal-protection violations); Pet. at 12; Pets.' Suppl. Br. at 3-4 (facial challenge); *Reed v. Reed*, 404 U.S. 71, 76 (1971) ("To give a mandatory preference to members of either sex... merely to [eliminate] hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment"); *Craig v. Boren*, 429 U.S. 190, 198 (1976) ("administrative ease and convenience [are insufficient] to justify gender-based classifications"); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) ("to conclusively deny one [class] benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment").

Although applying equal-protection principles to gender-segregated teams may be "a most delicate task," *cf. Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) (race-conscious voting districts), the constitutional, statutory, and regulatory violations become plain when gender becomes "the 'dominant and controlling' consideration," *id.*, as with capping *solely* to meet enrollment ratios. App. 252a (¶ 49); *Truax v. Raich*, 239 U.S. 33, 41 (1915) ("If [a right] could be refused solely upon the ground of [class membership], the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words"); Pet. at 12-13 & n.9 (numerical balance is not an end in itself, and the general population is not the "applicant pool"); *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("violate[s] Equal Protection Clause... to base enforcement... on an... arbitrary classification").

Ignoring the requested relief,[5] the panel majority opines

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[5] Petitioners seek (1) a declaration that Title IX authorizes only rules to effectuate its intentional-discrimination standard, prohibits gender-conscious cutting or capping to meet a disparate-impact standard, requires the use of interest (not enrollment) for any authorized gender-conscious decisions, and prohibits capping by defining "opportunity" as "a spot on a team, not an athlete on a team," and (2) an injunction staying the regulations until the Department completes a rulemaking consistent with the declaratory relief. App. 263-64a (¶ 99(A)(1)-(4), (B)(3), (B)(5)).

that Title IX or the regulations *may* authorize or require *some* gender-conscious cuts or caps, even if petitioners prevail, thereby defeating redressability. App. 104-05a, 113a; *but see* 5 U.S.C. § 706 ("the reviewing court shall decide *all* relevant questions of law") (emphasis added). Later, the majority opines that petitioners have an alternate remedy for *Title IX violations. Id.* 115a, 146a (petitioners have alleged "universities' actions... taken in derogation of Title IX"). If petitioners plead Title IX violations sufficiently to trigger § 704, they also establish their standing. *See also* Pets.' Suppl. Br. at 4-5 (supervening decision on pleading standards).

B. "Fact-Bound" Questions Warrant Review. Although fact-bound questions may not warrant review, Opp'n. at 11, this case asks important *legal questions* on how courts treat facts. Petitioners allege (and Appellants' Reply Brief argued) that, contrary to a General Accounting Office ("GAO") conclusion that men's opportunities increased by 36 teams (0.4%) in the 1980s and 1990s, men's teams declined by more than 800. App. 274-75a (¶ 64). Rather than accept the pleadings as true, the majority found GAO's increase "precise" and held that petitioners did not prove causation so clearly that redressability necessarily follows. App. 108-09a. Because GAO compared the teams at 1,185 schools in 1981 with those at 1,319 schools in 1999, a 134-school increase (11.3%), App. 274-75a (¶ 64), the panel majority viewed an 800-plus team *decrease* as a 36-team *increase*, misconstruing the alleged injury and undermining its redressability holding.[6] Pet. at 14. Further, in opposing a future motion to dismiss, petitioners could introduce evidence program, that

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[6] This Court could invoke the primary-jurisdiction doctrine to ask GAO to re-certify its report and methodology. *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673-74 (2003) (Breyer, J., concurring) (primary-jurisdiction "doctrine seeks to produce better informed... legal rulings by allowing courts to take advantage of an agency's specialized knowledge, [and] courts may raise the doctrine on their own motion"). Petitioner College Sports Council ("CSC") has sued GAO for issuing the materially misstated report and for failing to correct it after learning of ongoing reliance on those misstatements. *CSC v. GAO*, No. 03-1911-RBW (D.D.C.).

schools would revise their policies if petitioners prevail, and that petitioners would file administrative complaints on behalf of members against schools that do not revise policies.

II. TITLE IX RULES AND ORDERS SUBJECT TO STATUTORY AND NONSTATUTORY REVIEW

Although the panel majority's adequate-remedy analysis possibly is *dicta, Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005) (if appellants lack standing, "[a]ny statements by this Court on the question of the judicial review bar would be unnecessary *dicta.*"), this Court can decide whether 5 U.S.C. § 704 provides an alternate basis to dismiss this action. *Chevron U.S.A. Inc. v. N.R.D.C.*, 467 U.S. 837, 842 (1984) ("Court reviews judgments, not opinions").

A. Title IX Provides Statutory Review. Section 903 provides for judicial review of Title IX rules, regulations, and orders. 20 U.S.C. § 1683. Every prior appellate court to consider the question has determined that this judicial-review language incorporates APA review by statute. Pet. at 22 & n.15 (2nd, 3rd, 6th, and 9th circuits); *Schlafly v. Volpe*, 495 F.2d 273, 282 (7th Cir. 1974). The Department (like the panel majority) dodges petitioners' argument and tackles a straw man: "the reference to agency actions 'made reviewable by statute' in § 704 relates to statutory provisions *other than the APA*." Opp'n. at 12 (quoting App. 117a) (emphasis in original). But no one argues that *the APA* makes Title IX rules and orders reviewable by statute. *Section 903* makes them reviewable by statute. Pet. at 19-22 & nn.12, 14.

B. 1976 Waiver Did Not Narrow Review. The House and Senate reports to the APA's 1976 amendments both "say that 'the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity.'" *Bowen v. Massachusetts*, 487 U.S. 879, 899 (1988) (citations omitted); *id.* at 900 ("Federal grant-in-aid programs" among cases where "sovereign immunity defense had continued to pose an undesirable bar to consideration of the merits"). Courts should, therefore, read the 1976 amendments consistent with legislative intent *to expand* judicial review. *Bowen*,

487 U.S. at 896-98; *U.S. v. Yellow Cab Co.*, 340 U.S. 543, 554-55 (1951) ("[T]he congressional attitude in [waiving tort immunity] is more accurately reflected by Judge Cardozo's statement [that the] 'exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) ("realistic assessment of legislative intent" and "interpretation" implies "equitable tolling" in a statute of limitations). Contrary to the clear legislative intent, however, the Department and panel majority read the 1976 amendments *to narrow* previously existing review. Opp'n at 12-13; App. 117-18a.

1. APA Review. Even without Title IX's *statutory* review, the APA's generous *nonstatutory* review would apply to petitioners' programmatic challenge to the Title IX regime. Pet. at 26, 28. As Judge Williams recognized, App. 152a, the Department's agency-inaction cases are irrelevant to judicial review of a final rule or order. *See also* Pet. at 5 n.4 (if not a rule, action was an order). And a "specific *order or regulation*, applying some particular measure across the board... *can of course be challenged under the APA.*" *Id.* at 28 (*quoting Lujan Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990)) (emphasis added).

2. Non-APA Nonstatutory Review. Even without the APA, courts can review executive action taken in excess of authority (*ultra vires*) or in conflict with the Constitution. *Dugan v. Rank*, 372 U.S. 609, 622 (1963) (actions "not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in a particular case, are constitutionally void") (*quoting Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701-02 (1949)). Petitioners credibly argue (and the Department has not even attempted to rebut) that the challenged actions are *ultra vires* and unconstitutional, App. 255-61a (¶¶ 60-93) 281a (¶¶ 103-105); Pet. at 2-6, 12-13, 17-19, thus meeting their burden. Pet. at 24-25; *cf. Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636-37 (2002) ("inquiry into whether suit lies under *Ex*

parte Young does not include [merits] analysis").

Moreover, the 1946 APA did not eliminate prior forms of nonstatutory review, Pet. at 27, and the 1976 APA amendments did not expand the bar posed by § 704, *id.* at 23 (*citing Darby v. Cisneros*, 509 U.S. 137, 153 (1993)). Petitioners cite several non-APA bases for judicial review, Pet. at 22-26, which the Department does not attempt to rebut by anything other than § 704.[7] Because petitioners could bring this action *without the APA*, however, § 704 can pose no bar here.

C. **Enforcement Remedy Is Inadequate**. Although claiming that the panel majority considered the adequacy of the alternate remedy, Opp'n at 17, the Department ignores *at least* five inadequacies of private Title IX enforcement actions: (1) some of petitioners' members never had a timely enforcement action against their school's cutting men's teams, Pet. at 29-30; (2) as-yet uncut teams and uncapped athletes have no Title IX action, and a subsequently arising action against a school does not displace an equitable action against the Department, *id.* at 27; (3) school members have no alternate remedy whatsoever, *id.* at 30; (4) petitioners cannot enforce the regulatory requirement to measure and consider men's interest, Pets.' Suppl. Br. at 5-6; (5) petitioners' members wish to file administrative complaints, and (although doing so is futile now) they would do so if the Department changed its rules, *id.* at 3; Pet. at 28-29.

CONCLUSION

As set forth above, petitioners have both a right and a remedy against the Department. But if it finds the requested relief insufficient to move schools to alter their behavior, this

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[7] The Department does protest that an officer suit is merely "another way of pleading" against an entity, Opp'n at 12-13 (*quoting Kentucky v. Graham*, U.S. 473 U.S. 159, 165 (1985)), without acknowledging that "official-capacity actions for prospective relief [are not] against the [sovereign]." Pet. at 24 n.17 (*quoting Graham*, 473 U.S. at 167 n.14). The Department's facile point is thus incomplete: the question is not whether an officer suit is a different form of pleading. It obviously is. The question is whether it is a difference with a distinction. Petitioners (and centuries of history) argue that it is. Pet. at 22-26; *see* Pets.' Suppl. Br. at 8-9 (naming officer).

Court easily can remand this action to the judicial districts for the named schools (*i.e.*, Connecticut, Pennsylvania, Wisconsin, and Illinois). 28 U.S.C. § 2106. The Second, Third, and Seventh Circuits all recognize that § 903 provides judicial review of Title IX rules and orders, and the district courts there could - even without joining the schools as parties - fashion injunctive relief to ensure that the schools comply with the Title IX regime under petitioners' requested relief. 28 U.S.C. § 1651(a). For schools generally and Yale specifically, *see* Pet. at 15-16, this Court can be certain that the schools would cease capping and move the equal-protection fulcrum from enrollment back to interest. Even if it does not restore a single lost team, it will save at-risk teams and redress the equal-protection injuries of both cut and at-risk teams alike.

May 9, 2005

Respectfully submitted,

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

APPENDIX

(Continued)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WRESTLING COACHES ASSOCIATION,
1976 Auction Road
Manheim, PA 17545,

* * *

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF EDUCATION,
400 Maryland Avenue, SW
Washington, DC 20202,

SECRETARY OF EDUCATION,
400 Maryland Avenue, SW
Washington, DC 20202,

and

ASSISTANT SECRETARY OF EDUCATION OF CIVIL RIGHTS,
400 Maryland Avenue, SW
Washington, DC 20202,

Defendant.

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The National Wrestling Coaches Association ("NWCA"), the Committee to Save Bucknell Wrestling ("Bucknell Wrestling"), the Marquette Wrestling Club ("Marquette Wrestling"), the Yale Wrestling Association ("Yale Wrestling"), and the College Sports Council ("CSC"),

plaintiffs in the above-captioned action, seek declaratory and injunctive relief based on the following allegations.

NATURE OF THE ACTION

1. Plaintiffs bring this action to protect intercollegiate and scholastic athletic opportunities and teams from further elimination, and to restore such opportunities and teams previously eliminated, as the direct and indirect result of the unlawful rules that the United States Department of Education ("Department"), Secretary of Education, and Assistant Secretary of Civil Rights (collectively, "USDE") have issued under the color of implementing Title IX of the General Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 (2000) ("Title IX").

* * *

3. Plaintiffs seek declaratory and injunctive relief to compel USDE to comply with the Equal Protection component of the Due Process Clause, U.S. CONST. amend. V, the discrimination prohibitions of Title IX, 20 U.S.C. §§ 1681-1682, and the rulemaking requirements of both Title IX, 20 U.S.C. § 1682, and the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (2000) ("APA"). As set forth more fully below, Plaintiffs seek the following declaratory and injunctive relief:

* * *

(c) a declaratory judgment that, in authorizing intentional discrimination under the unlawful Title IX rules, USDE has consciously and expressly adopted a general policy that abdicates the statutory duty to prevent discrimination and to issue rules, regulations, and orders that effectuate Title IX's prohibition against intentional discrimination;

* * *

PARTIES

4. Plaintiff NWCA, incorporated under the laws of Iowa and headquartered in Manheim, Pennsylvania, is a not-for-profit corporation dedicated to the advancement of the sport of wrestling, primarily at the scholastic and collegiate levels. NWCA's members include both natural persons (such as scholastic and collegiate coaches, alumni, and the general public) and organizations (such as federally funded colleges and universities (collectively hereinafter, "institutions"), federally funded secondary schools, athletic associations, and save-our-sport groups). NWCA's members include federally funded colleges, universities, high schools, and associations of high schools that are directly affected by the Title IX rules challenged in this action. See Ex. A(declaration of Patrick A. Tocci, II). NWCA's athletic-association members include associations with high school and collegiate athlete-members and state high school athletic associations. NWCA's members have ongoing legal, educational, professional, economic, and aesthetic interests in collegiate and scholastic wrestling, which interests have been harmed and restricted (and continue to be harmed and restricted) by USDE's unlawful Title IX rules. Plaintiff NWCA receives membership dues from its members. The number of dues-paying members decreases when institutions (at scholastic or collegiate level) discontinue their wrestling program. See id.

* * *

8. Plaintiff CSC, incorporated under the laws of the District of Columbia and headquartered in Washington, D.C., is a not-for-profit corporation serving as an umbrella group for organizations representing the interests of

collegiate coaches and athletes. CSC members include, without limitation, the nationwide collegiate coaches associations for men's and women's swimming (College Swimming Coaches Association of America), men's and women's track and field (United States Track Coaches Association), men's wrestling (NWCA), and men's gymnastics (College Gymnastics Association). The individuals and institutions that are members of CSC's member organizations have educational, professional, economic, participatory, aesthetic, and spectator interests in intercollegiate swimming, track and field, wrestling, gymnastics, and other sports. These interests have been harmed (and continue to be harmed) by the elimination of intercollegiate sports opportunities and teams that result from institutions' efforts to comply with USDE's unlawful Title IX rules.

9. Defendant Department, headquartered in the District of Columbia, is an executive department of the United States government. Congress has empowered the Department to extend federal financial assistance to educational programs and activities. Defendants Secretary and Assistant Secretary of Civil Rights are officers of the Department, 20 U.S.C. §§ 3411, 3412(b)(1)(E), named as defendants in their official capacity.

JURISDICTION AND VENUE

10. This case arises out of USDE's violation of Sections 901 and 902 of Title IX, 20 U.S.C. §§ 1681, 1682, Section 4 of the APA, 5 U.S.C. § 553, and the Equal Protection component of the Due Process Clause, U.S. CONST. amend. V. Plaintiffs' claims, therefore, raise federal questions and questions of civil rights under acts of Congress, over which this Court has jurisdiction pursuant to

28 U.S.C. §§ 1331, 1343(a)(4), 1346(a)(2), 1361 (2000), the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), and D.C. Code § 11-501.

* * *

STATUTORY BACKGROUND

* * *

20. On February 11, 1984, the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984) (hereinafter, Grove City), held that Title IX extended only to the educational programs and activities that directly received federal funds.

21. In the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988) ("CRRA"), Congress extended the reach of Title IX to all of a school's educational programs and activities if any of the school's educational programs and activities received federal funds. The CRRA authorized federal funding agencies to issue rules, regulations, and orders of general applicability under 20 U.S.C. § 1682 to apply to such educational programs and activities that do not directly receive federal funding, but CRRA did not extend the scope of any rules, regulations, or orders issued under the pre-CRRA Title IX.

REGULATORY BACKGROUND

1975 HEW Regulations

* * *

26. Under the regulations as promulgated, "level of competition" refers to the type of team offered (i.e., intramural, club, intercollegiate/interscholastic varsity) and "selection of sports" refers to the sport offered (e.g., track and field, gymnastics, swimming).

* * *

1979 HEW Policy Interpretation

* * *

36. With regard to selecting the level of competition (i.e., determining whether to field intramural, club, or intercollegiate varsity teams), the 1979 Policy Interpretation does not require institutions to upgrade teams to intercollegiate status absent a "reasonable expectation" that intercollegiate competition will be available in the institution's normal competitive region. When opportunities for a gender have been limited, however, the 1979 Policy Interpretation may require the institution to encourage development of competition in the region.

* * *

Formation of USDE and the 1980 USDE Regulations

* * *

42. USDE prepared enforcement manuals in 1980 and 1990, but neither published them in the Federal Register nor sought or received approval from the Office of the Federal Register to incorporate them by reference in the Federal Register.

* * *

1996 USDE Clarification

* * *

52. The 1996 Clarification was USDE's first public announcement that USDE had extended the Three-Part Test to interscholastic athletic programs.

53. The 1996 Clarification was USDE's first post-Grove City public announcement that the Three-Part Test applied to athletic departments that do not directly receive federal funds.

54. The third prong of the Three-Part Test described in the 1996 Clarification differs from the that described in USDE's 1980 Title IX Intercollegiate Athletics Investigator's Manual. Specifically, in 1980, USDE interpreted prong three to mean that a school must accommodates the underrepresented gender's interest "to the same degree that it accommodates the interests . . . of the other gender." In the 1996 Clarification, USDE published a change in the inquiry of prong three to whether the underrepresented gender has "(a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team."

55. USDE neither published the 1996 Clarification in the Federal Register nor sought or received approval from the Office of the Federal Register to incorporate the 1996 Clarification (or the September 20, 1995 draft clarification) by reference in the Federal Register.

56. In the 1995-96 Clarification process, USDE did not follow any procedure that USDE previously had published in the Federal Register pursuant to 5 U.S.C. § 552(a)(1)(C).

* * *

Post-1996 Enforcement

58. Since January 16, 1996, USDE has conducted the inspection, enforcement, and oversight of intercollegiate and interscholastic athletics using the 1979 Three-Part Test, as revised by the 1996 Clarification.

59. Since January 16, 1996, USDE has initiated investigations at institutions where athletic participation rates did not match enrollment rates by gender, but where no student had alleged discrimination.

60. Pursuant to the Three-Part Test, as revised by the 1996 Clarification, since January 16, 1996, USDE has negotiated and monitored compliance agreements with institutions. As a result of such actions, the institutions reduced male participation opportunities through gender-conscious cutting and capping of men's athletic opportunities.

61. On information and belief, on or about January 5, 2000, USDE negotiated and entered into a compliance agreement with Northwestern University that requires Northwestern either to meet prong one of the Three-Part Test (enrollment proportionality) by June 30, 2002 or to conduct a survey of the interests and abilities of female (but not male) students to demonstrate compliance with the Three-Part Test, as revised by the 1996 Clarification. Ex. B (copy of compliance agreement from Department's internet site). As a result of the compliance agreement, with USDE's knowledge, monitoring, and assent, Northwestern has imposed caps on men's teams that affect members of Plaintiffs NWCA and CSC, including without limitation the men's swimming and wrestling coaches at Northwestern.

Effects of 1979 Policy Interpretation and 1996 Clarification

62. USDE's unlawful Title IX policies directly and indirectly have reduced (and continue to limit and to reduce) participation opportunities for male athletes.

63. Seeking to avoid such USDE enforcement actions, institutions have limited male participation opportunities to comply with USDE's unlawful Title IX policies.

64. As a direct and indirect result of USDE's unlawful Title IX policies, therefore, institutions (including institutions that are members of Plaintiffs and those that are

the actual or prospective employer or alma mater of members of Plaintiffs) have cut hundreds of men's teams and have capped hundreds of men's participation opportunities. See, e.g., U.S. General Accounting Office, "Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams," at 18 (March 2001) (one third of institutions acknowledged cutting teams to comply with gender equity goals or requirements) ("GAO Study"). According to the GAO Study, the number of schools in the National Collegiate Athletic Association ("NCAA") and the National Association of Intercollegiate Athletics ("NAIA") increased by 134 (from 1,185 to 1,319) between 1981-82 and 1998-99. Id. at 32.[22] During the same period, the total number of men's teams increased by only 36. With an average of approximately seven teams per school, these changes represent a loss of more than 800 men's teams during the 1980s and 1990s.

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[2] In 1981-82, NCAA had 787 members, NAIA had 515 members, and 117 were in both the NCAA and NAIA. Id. at 32. The GAO's 1981-82 survey included 1,185 schools (787 + 515 - 117). Similarly, in 1998-99, NCAA had 1,041 members, NAIA had 339 members, and 61 were in both NCAA and NAIA. Id. The GAO's 1998-99 survey covered 1,319 schools (1,041 + 339 - 61).

65. As the direct and indirect result of USDE's unlawful Title IX policies, under the euphemism "roster management," members of Plaintiff NWCA and members of Plaintiff CSC's members have been forced to serve (and continue to be forced to serve) as the involuntary participants who implement USDE's unlawful Title IX policies by capping athletes solely to achieve the quotas established pursuant to USDE's unlawful Title IX rules.

66. By press release dated May 2, 2001, Bucknell announced that it would discontinue intercollegiate wrestling starting with the 2002-03 season to bring Bucknell into compliance with Title IX. The press release notes that, although Bucknell offered 14 men's teams and 14 women's teams in 2001-02, women comprised 48.7 percent of enrolled students, but only 41.9 percent of student-athletes. A companion Bucknell question-and-answer document cites Title IX's proportionality requirements as Bucknell's reason for eliminating the wrestling team. Ex. C (Bucknell University Moving Forward with Gender Equity Plan (May 2, 2001)).

67. On June 15, 2001, Marquette announced that it would discontinue the privately financed Marquette wrestling team in order to achieve compliance with USDE's Title IX policies. Ex. D (Marquette to Discontinue Sponsorship of Wrestling As An Intercollegiate Sport (June 17, 2001)). Marquette had cut the program's funding after the 1992-93 academic year. Between the 1993-94 and 2000-01 academic years, Plaintiff Marquette Wrestling had supported the Marquette wrestling program through its private fundraising efforts, without Marquette's financial support. At a Marquette Wrestling dinner commemorating the end of the 52-year history of Marquette's wrestling

program. Marquette's athletic director indicated that Marquette might bring back its wrestling program if the legal requirements changed.

68. At the end of the 1990-91 academic year, Yale decided to demote its intercollegiate varsity wrestling team to "club" status, citing budgetary reasons. To avert this demotion, Yale Wrestling offered to endow the Yale wrestling program to allow wrestling to continue at Yale despite the budget cuts. On information and belief, Yale declined to accept the endowment because of Title IX.

69. In 1999, Miami University eliminated its wrestling, tennis, and soccer teams to comply with USDE's proportionality requirements. Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 610-11 (6th Cir. 2002).

70. In or about 1996, Illinois State University eliminated its wrestling and soccer teams to comply with USDE's proportionality requirements. Boulahanis v. Board of Regents, 198 F.3d 633, 635-36 (7th Cir. 1999).

71. Institutions, athletic directors, and coaches that are members of Plaintiff NWCA or members of Plaintiff CSC's members and that provide or participate in providing athletic opportunities must engage in intentional discrimination (gender-conscious cutting and capping) in violation of Title IX in order to comply with USDE's disparate-impact standard (the Three-Part Test) and with USDE-negotiated settlements. Because they cannot sue themselves, they cannot obtain an adequate remedy in any other challenge to USDE's Title IX rules.

72. The injunctive and declaratory relief requested in paragraph 126, infra, will redress the injuries alleged herein by eliminating the USDE's unlawful Title IX rules and thereby restoring the statute's protections against

intentional gender-conscious discrimination, 20 U.S.C. § 1681, and the regulations' requirement that institutions provide equal opportunity (not equal participation) based on interest and abilities (not enrollment). 45 C.F.R. § 86.41(c)(1). The injunctive and declaratory relief are necessary to restore the rights of men and women to an equal footing in the allocation of athletic opportunities.

73. Enforcement actions brought against schools do not provide an adequate remedy for student-athletes because schools typically announce cutting and capping decisions in the Spring after the deadline for applying to transfer. See, e.g., Ex. C (Bucknell University), D (Marquette University). Cutting and capping decisions often come after the schools that still may accept transferees for the next year have allocated their scholarships. As a result, when a school makes a cut or announces capping, student-athletes do not have an opportunity to seek other opportunities.

74. Declaratory relief is inadequate to remedy Plaintiffs' injury because USDE's Three-Part Test, as revised by the 1996 Clarification, serves as a substantial factor motivating schools' decisions to cut or cap men's athletic opportunities. See, e.g., Ex. C (Bucknell University), D (Marquette University). Because USDE's Three-Part Test has become synonymous with "gender equity," see, e.g., Ex. C (Bucknell University), failure to meet the Three-Part Test is equated with gender inequity, and thus tarnishes the institution's reputation, notwithstanding that a school in fact may comply with the regulatory standard (equal opportunity based on interest). As long as it remains extant as an influential document of the agency responsible for much of schools' federal funding, therefore, the Three-Part

Test will remain a substantial factor in schools' decisions on what athletic opportunities to provide.

USDE'S 1996 CLARIFICATION RENDERS THE 1979 POLICY INTERPRETATION SUBJECT TO RENEWED JUDICIAL REVIEW

* * *

79. Although the Three-Part Test in the 1979 Policy Interpretation did not apply by its terms to interscholastic athletic programs and neither the 1995 draft clarification nor the final 1996 Clarification published any data or made any findings that discrimination exists at the interscholastic level, the 1996 Clarification extends the scope of the Three-Part Test to interscholastic athletics. Accordingly, USDE's 1996 Clarification revealed an aspect of the Three-Part Test that was unforeseeable in 1979, thereby reopening the 1979 Policy Interpretation to judicial review.

80. Although USDE previously memorialized and followed an interpretation of the third prong (fully accommodating the interests of the underrepresented gender) that required accommodating the underrepresented gender's interest to the same extent as the school accommodated the other gender's interest, the 1996 Clarification changed the analysis to one based solely on the accommodation of the interests of the underrepresented gender, without regard for the degree of accommodation of the other gender. Accordingly, USDE's 1996 Clarification changed the interpretation of an aspect of the Three-Part Test, thereby reopening the 1979 Policy Interpretation to judicial review.

* * *

III.
USDE UNLAWFULLY DENIED PETITIONS TO AMEND OR REPEAL THE "THREE-PART TEST"

* * *

99. In the 1995-96 Clarification process, USDE neither followed existing Department procedures published previously in the Federal Register nor published Clarification-specific procedures in the Federal Register.

* * *

IV.
USDE'S GENDER PROPORTIONALITY RULES ARE ULTRA VIRES AND AN ABDICATION OF THE STATUTORY DUTY TO ISSUE RULES, REGULATIONS, AND ORDERS TO EFFECTUATE TITLE IX'S PROHIBITION OF INTENTIONAL GENDER DISCRIMINATION AND TO FOLLOW APA-MANDATED PROCEDURES

* * *

103. By adopting a disparate-impact standard for athletics (namely, the Three-Part Test, as revised by the 1996 Clarification) that authorizes intentional discrimination, USDE acted (and continues to act) ultra vires and in violation of the ongoing duty to issue rules, regulations, and orders to effectuate the Title IX's prohibition of intentional gender discrimination.

104. By adopting such disparate-impact standard for athletics without following APA-mandated procedures, USDE acted (and continues to act) ultra vires and in violation of the Due Process Clause's Equal Protection component, Title IX, and the APA.

105. By countenancing gender-conscious capping and cuts by recipients of federal funds in violation of the equal-opportunity regulations and Title IX, including such gender-conscious measures in settlements to USDE-initiated and USDE-monitored investigations, and in issuing the 1996 Clarification, USDE has acted ultra vires and has "consciously and expressly adopted a general policy" that abdicates statutory duties under Title IX.

* * *

VII
AS AN INTERPRETIVE RULE PURPORTING TO AMEND A SUBSTANTIVE RULE AND PRIOR REGULATORY INTERPRETATION, THE 1996 CLARIFICATION IS NULL AND VOID

* * *

121. By its terms, the 1979 Three-Part Test did not apply to interscholastic athletic programs. In the 1996 Clarification, USDE amended the Three-Part Test to apply to interscholastic athletics.

122. In the Department's 1980 enforcement manual (Title IX Intercollegiate Athletics Investigator's Manual), the third prong of the Three-Part Test (fully accommodating the interests of the underrepresented gender) required schools to assess whether they accommodated the underrepresented gender's interest to the same extent as they accommodated the other gender's interest. In the 1996 Clarification, USDE amended the third prong of the Three-Part Test to refer only to whether the interests of the underrepresented gender were fully accommodated, with no regard for whether the interests of the other gender also were fully accommodated.

* * *

PRAYER FOR RELIEF

126. Wherefore, Plaintiffs respectfully request that this Court enter the following relief:

A. Pursuant to 5 U.S.C. § 706(2), 28 U.S.C. §§ 1331, 1343(a)(4), 1346(a)(2), 1361, 2201-2202, the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), D.C. Code § 11-501, Fed. R. Civ. Proc. 57, and the court's equitable powers, a Declaratory Judgment that:

* * *

(7) In the 1996 Clarification, USDE acted ultra vires under both Title IX and the APA by consciously and expressly adopting a general policy that abdicates the statutory duty to issue rules, regulations, and orders to effectuate Title IX's prohibition of intentional gender discrimination without following APA-mandated procedures;

* * *

B. Pursuant to 5 U.S.C. § 706(2), 28 U.S.C. §§ 1331, 1343(a)(4), 1346(a)(2), 1361, 2202, the Acts of March 3, 1863, 12 Stat. 762, and June 25, 1936, 49 Stat. 1921 (as amended), D.C. Code § 11-501, and the court's equitable powers, an Order providing that

(1) USDE's 1996 Clarification is vacated in its entirety as arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of the authority provided to USDE by Congress, and promulgated without observing the procedures required by law;

(2) The Three-Part Test is vacated as arbitrary, capricious, an abuse of discretion, not otherwise

in accordance with the law, in excess of the authority provided to USDE by Congress, and promulgated without observing the procedures required by law;

* * *

(5) USDE's Title IX rules with respect to athletic opportunities are stayed until USDE promulgates a final rule pursuant to this Court's order and until such rules become effective pursuant to 20 U.S.C. § 1682.

C. Pursuant to 42 U.S.C. § 1988(b) (1994) and 28 U.S.C. § 2412 (1994), award Plaintiffs their costs, including attorneys fees.

D. Such other relief as may be just and proper.

Dated: Oct. 28, 2002 Respectfully submitted,

Lawrence J. Joseph, D.C. Bar No. 464777
Robert A. Matthews, D.C. Bar No. 431944
McKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 496-7500
Telecopier: (202) 496-7756
Attorneys for Plaintiffs National Wrestling Coaches Association, Committee to Save Bucknell Wrestling, Marquette Wrestling Club, Yale Wrestling Association, and College Sports Council

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No. 04-922

IN THE
Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
MARQUETTE WRESTLING CLUB,
YALE WRESTLING ASSOCIATION, AND
COLLEGE SPORTS COUNCIL,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION,

RESPONDENT

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners file this Supplemental Brief to advise the Court of new decisions and other matters, which have arisen since the filing of the petition for a writ of *certiorari* on January 6, 2005. In a separate filing, petitioners will reply to the Department's opposition filed on April 25, 2005.

I. *JACKSON* LITIGATION

On March 29, 2005, this Court held that Title IX's statutory ban on "discrimination" "on the basis of sex," 20 U.S.C. § 1681(a), includes differential treatment of a coach related to sex discrimination against his team. *Jackson v. Birmingham Bd. of Educ.*, 125 S.Ct. 1497, 1504 (2005). *Jackson* also held that *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), held that 42 U.S.C. § 1982 includes a federal cause of action for retaliation against third-party advocacy, *id.* at 1505 n.1, that Coach Jackson's complaint alleges that he was retaliated against because of sex discrimination under Title IX, *id.* at 1510, and that Title IX does not authorize private actions to enforce regulatory requirements that exceed the scope of Title IX's statutory prohibition, *id.* at 1507 n.2.

The next four sections argue (1) that the recognition of coaches as direct beneficiaries under Title IX enables petitioners' coach members to allege redressable Title IX injuries, (2) that those injuries fall within the First Amendment, which establishes petitioners' standing to bring a facial challenge, (3) that petitioners adequately plead intentional discrimination under the notice-pleading standards recognized in *Jackson*, and (4) that *Jackson* clarifies that petitioners have no alternate remedy to enforce the Title IX regulations.

A. Discrimination Because of Third-Party's Sex. Until *Jackson*, it was not apparent that Title IX's statutory prohibition of gender discrimination includes a school's intentional, differential treatment of a teacher or coach based on the gender of a third-party student or athlete. 125 S.Ct. at 1508 ("teachers and coaches... are often in the best position to vindicate the rights of their students [and] to identify discrimination and bring it to the attention of administrators"). *Jackson* therefore opens the door to redressable Title IX injuries that coach members have suffered, continue to suffer,

and would assert against a future motion to dismiss.

Petitioners did not anticipate the breadth of the *Jackson* holding: the identified circuit split, 125 S.Ct. at 1503, concerned the enforceability of the retaliation regulation, not the statute.[1] Indeed, four justices dissented in *Jackson*, *id.* at 1510, and – to the extent that *Jackson* relies on *Sullivan* – three dissenting justices considered that decision "highly elliptical." 396 U.S. at 251 (1969) (Harlan, J., dissenting). Finally, because *Sullivan* came to this Court from the Virginia state courts, *Sullivan v. Little Hunting Park, Inc.*, 209 Va. 279, 163 S.E.2d 588 (Va. 1968) (plaintiffs brought actions as "chancery causes" in state court), it was not apparent that this Court later would read *Sullivan* to find a federal cause of action for third-party discrimination. *Jackson*, 125 S.Ct. at 1505 n.1. Instead, as an equity action in state court, *Sullivan* appeared to consider whether to allow an action under "a special function or authority of the courts to *dispense with fixed legal rules,... to supplement their defects* in particular cases,... in obedience to the dictates of natural right, or morality, or conscience." 1 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 45 (5th ed. 1941) (emphasis added).[2]

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[1] *See Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 250 (5th Cir. 1997) (asking whether plaintiff was "a member of the special class for whose benefit 34 C.F.R. § 100.7(e) was enacted"); *Preston v. Com. of Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 n.2 (4th Cir. 1994) (citing 34 C.F.R. § 100.7(e) as the basis for Title IX's prohibition of retaliation). Coming before *Alexander v. Sandoval*, 532 U.S. 275 (2001), these regulation-based decisions provided no notice that § 901(a) covers differential treatment of coaches because of sex discrimination against their teams.

[2] Indeed, if it openly had held that Mr. Sullivan had a federal cause of action, this Court may well have provided the recalcitrant Virginia courts a separate and new reason to dismiss Mr. Sullivan's suit on remand. *See, e.g., Ewing v. Dutrow*, 128 Va. 416, 104 S.E. 791, 792-93 (Va. 1920) ("wherever there exists at law a complete and adequate power, either for the prosecution of a right or the redressing of a wrong, courts of equity... have no jurisdiction or power to act") (citations and quotations omitted).

Petitioners raise these points not to quibble with the *Jackson* holding (which does not ultimately depend on *Sullivan*), but to justify their prior failure to have alleged coaches' direct injuries under Title IX and to authorize their making new arguments on appeal on the issue of standing. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (where coverage of a statute is at issue below, petitioner can raise new coverage arguments in seeking *certiorari*); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim'") (*quoting Yee v. Escondido*, 503 U.S. 519, 534 (1992)); *cf. Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-43 (1967) (new rule of law justifies allowing defendant to raise new defenses on appeal).

But even if they waived these injuries as a defense against the Department's motion to dismiss the *First Amended Complaint*, the Department no longer credibly can argue the futility of leave to file the *Second Amended Complaint*. App. 37a (denying leave for futility under *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Petitioners would file affidavits (1) that male and female member coaches of men's teams face artificial squad-size caps, solely to meet the Department's enrollment quota, (2) that male and female coaches of women's teams at the same schools do not have caps and instead can increase their squad sizes at will, (3) that under the requested relief (*i.e.*, an interest-based standard that prohibits intentional discrimination), schools would lose federal funding for continuing these practices, (4) that schools would change their policies to maintain federal funds; and (5) that petitioners or their members would file administrative complaints against schools that did not voluntarily change their behavior after petitioners prevail.

B. Standing for Facial Challenge. Along with the advocacy interest in *Jackson*, coaches have educational and associational interests protected by Title IX's broad sweep. 125 S.Ct. at 1505. Because the Three-Part Test interferes with these First-Amendment interests, petitioners' members have standing to bring a *facial challenge* against the Department's

overbroad rules, even if - as applied to them - those members would not have Article III standing to challenge a particular aspect of a rule. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations") (citing cases); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("(p)recision of regulation must be the touchstone in an area so closely touching our most precious [academic] freedoms") (citations omitted); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (requiring "colorable First Amendment challenge" to rebut "rule of rationality which will sustain legislation against other constitutional challenges").

In *Lyng v. Int'l Union*, this Court was "obliged" to consider a federal provision's First-Amendment associational restrictions in an equal-protection challenge. 485 U.S. 360, 365-66 (1988). Unlike the statute there, the rules here "directly and substantially interfere with [petitioners'] ability to associate" "in pursuit of a common goal by lawful means." *Id.* (internal quotations and citations omitted); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("State may not accomplish [a legitimate] purpose by invidious distinctions between classes of its citizens"), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *cf. Texas v. Lesage*, 528 U.S. 18, 21 (1999) (applying First Amendment caselaw to equal-protection issue); *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982) ("denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit").

C. <u>Pleading Intentional Discrimination</u>. Coach Jackson's amended complaint alleges that he "complained... about gender discrimination in association with the girls' basketball" team that he coached, "noted serious infractions with regards to the expense accounts," and "noted the girls were prohibited from using various equipment including

but not limited to the sports facility." His complaint also alleges that "[t]he girls team was not provided a key for the padlock for the facility" and that Coach Jackson "was subjected to adverse terms of employment because of gender discrimination" and "subjected to... work conditions which were limited in enforcement to individuals in a protected class, female." *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672 (U.S.), J.A., at 10-11.

Under notice pleading, a complaint must give fair notice of the plaintiff's claim. *Conley v. Gibson*, 355 U.S. 41, 47 (1957), and alleging a disparate impact does not plead intentional discrimination, *Washington v. Davis*, 426 U.S. 229, 238-40 (1976). Coach Jackson did not allege that the school had a boys' basketball team; that any boys' teams had access to the sports facility, keys to the padlock, or expense accounts; or that (if they did) the differential treatment was "because of sex." Thus, nothing in the complaint supports an underlying Title IX violation except the allegation of "sex discrimination." Under notice pleading, however, that allegation suffices at the pleading stage. Pet. at 10-12. Petitioners have alleged both unlawful discrimination and that the challenged agency actions authorize that unlawful discrimination. App. 251-57a (¶¶ 48-53, 56, 60-70), 281a (¶¶ 103-105). Thus, petitioners have standing because the challenged action authorizes otherwise-illegal conduct. Pet. at 12-13; Pets.' Reply Br. at 4-6.

D. Alternate Remedy to Enforce Regulations. The Title IX regulations require schools to assess both genders' interest, which the challenged rules change to measuring participation and comparing it to enrollment. Pet. at 4-6. Although petitioners have procedural and equal-protection interests in schools' following the regulations, *Jackson* renders those regulations privately unenforceable. 125 S.Ct. at 1507 n.2. Because they have no alternate remedy to enforce the Title IX regulations against schools, petitioners can sue the Department to require it to follow its regulations. 5 U.S.C. § 704; *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agen-

cies to follow their own procedures").

II. "ADDITIONAL CLARIFICATION"

On March 17, 2005, the Department issued a clarification of the Three-Part Test. James F. Manning, Delegated the Authority of the Assistant Secretary for Civil Rights, "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test - Part Three" (Mar. 17, 2005) ("Additional Clarification").[3] The Additional Clarification describes the Three-Part Test as creating "obligations." Cover letter, at 1. Although the Additional Clarification creates a presumption of Title IX compliance (even if a school surveys the interests only of the statistically under-represented gender), that presumption does not apply to school that cut a team for that gender. Additional Clarification, at 7. Thus, at non-proportional schools, the Three-Part Test continues to impose all financially motivated cuts solely on men's teams, regardless of any other factor. Pet. at 14.[4]

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[3] The new clarification is available at http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf (last visited May 6, 2005).

[4] Although it indicates that the Department does not enforce the Fourteenth Amendment, *Id.* at 1 n.1 ("because the scope of the Equal Protection Clause of the Fourteenth Amendment may differ from the scope of the Title IX statute, this Additional Clarification does not regulate or implement constitutional requirements or constitute advice about the Constitution"), the Three-Part Test materially has altered the *constitutional rights* of teachers, students, and coaches in at least three circuits, which consider Title IX to displace an equal-protection challenge under 42 U.S.C. § 1983. *Compare Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir. 1996) (availability of a Title IX claim preempted claims under § 1983); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3rd Cir. 1990) (constitutional claims asserted under § 1983 are subsumed under Title IX); *Bruneau ex rel. Schofield v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 757 (2nd Cir.1998) ("We see nothing in *Sea Clammers* that would support a constitutional rights exception") *with Seamons v. Snow*, 84 F.3d 1226, 1233-34 & n.8 (10th Cir. 1996) (Title IX does not bar a § 1983 action so long as it is not based on a violation of Title IX itself); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723-24 (6th Cir.1996) ("the *National Sea Clammers* doctrine pre-

(Footnote cont'd on next page)

A. Department Needs Judicial Oversight. Petitioners have unearthed (and served on the Department) the procedural history of the 1979 Three-Part Test in the National Archives. These documents demonstrate that in 1979 the agency agreed with petitioners. *See* Pet. at 5 (procedural requirements triggered if agency classifies document as a rule); App. 219a ("failure to meet the [Policy Interpretation] compliance factors does not constitute proof that an educational institution violated Title IX"). By continuing to call the Three-Part Test an obligation and re-clarifying it, even after learning its procedural heritage, the Department merely adjusts the hem on the emperor's new clothes. Even more than petitioners, the Department needs a court to declare the law.

B. Repeal Redresses Unequal-Footing Injury. The Additional Clarification's primary relevance lies in the reaction to it. *See, e.g.*, Michael Dobbs, *Title IX Web Surveys Criticized by NCAA*, WASHINGTON POST, Mar. 24, 2005, at D1 ("[National Collegiate Athletic Association] President Myles Brand [said that the] new guidelines... 'will likely stymie the growth of women's athletics'"); Tamar Lewin, *U.S. Rule on Women's Sports May Ease College Compliance*, N.Y. TIMES, Mar. 23, 2005, at A15 ("new guidance changes the whole landscape") (quoting Marcia Greenberger of the National Women's Law Center ("NWLC")).[5] If a minor clarification to the Three-Part Test's third prong would "likely stymie" the practice of adding women's teams in so-called emerging

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(Footnote cont'd from previous page.)

sents no impediment to the plaintiffs' pursuit of remedies for alleged violations of substantive due process"); *cf. Comm. for Full Employment v. Blumenthal*, 606 F.2d 1062, 1066 (D.C. Cir. 1979) (otherwise-illegal theory of standing applies where Fourteenth Amendment would continue to prohibit discrimination, even if recipient eschewed federal funds).

[5] As *amici curiae* below, NWLC argued that petitioners' prevailing would not effect school's actions and that Title IX did not cause schools' actions.

sports (*e.g.*, crew, equestrian[6]) or change the landscape, the *repeal* of all three prongs clearly would redress petitioners' unequal-footing injuries, even schools' adding back men's team. *Heckler v. Mathews*, 465 U.S. 728, 738-40 (1984) ("equal treatment... can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class"). Notwithstanding a merits dispute about which gender is the "favored class," the Three-Part Test's proponents and opponents all oppose invidious discrimination (Section I.B, *supra*) and unequal treatment. They differ, however, on how to measure equality (*e.g.*, interest vs. enrollment, App. 257a (¶ 69)) and when gender may serve as a controlling factor to remedy statistical imbalance in the absence of intentional discrimination. Whatever the ultimate resolution, the duly promulgated and presidentially approved regulations unambiguously put the equal-opportunity fulcrum at relative interest, not enrollment. Pet. at 4, Public statements on the Additional Clarification suggest that petitioners have standing to assert that claim.

III. NEW SECRETARY OF EDUCATION

On January 20, 2005, the Senate confirmed the Hon. Margaret Spellings as the Secretary of Education. 151 Cong.

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[6] At the interscholastic level, boy's track and wrestling are two orders of magnitude more popular than girl's crew or equestrian, and girls' crew and equestrian are not appreciably more popular than boys' crew and equestrian: track (491,822 boys, 415,666 girls); wrestling (244,984 boys, 3,032 girls); crew (2,186 boys, 2,359 girls); and equestrian (64 boys, 657 girls). *Amici Curiae* Br. of NWLC *et al.*, Ex. 12, at 181,185, 189, 191, No. 02-0072 (D.D.C.). While it does not impose a *per se* preference for track or wrestling over crew or equestrian, Title IX does prohibit gender-based discrimination. 20 U.S.C. § 1681(a). Thus, while a school may prefer men's, women's, or co-ed crew or equestrian over the more-popular track and wrestling, cutting men's track or wrestling and adding women's (but not men's) crew or equestrian provides strong circumstantial evidence of gender as an impermissibly controlling factor and, under an interest-based standard, of a Title IX violation.

Rec. S105 (daily ed. Jan. 20, 2005). By citing this judicially noticeable fact, petitioners cure the jurisdictional pleading defect in their Second Amended Complaint, which sought to invoke the legal fiction under *Ex parte Young*, 209 U.S. 123 (1908), of suing an *officer* as an alternative to suing the sovereign, but named only the federal *office*. *See* 28 U.S.C. § 1653; Pet. at 8-9 (citing cases); Sup. Ct. Rule 35.4; FED. R. CIV. P. 25(d)(2). Under *Ex parte Young*, courts often dismiss a suit against an agency while simultaneously ruling against that agency's officers. *See, e.g., Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 n.4 (1986); *cf. Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636-37 (2002) (declining even to address agency's potential waiver of sovereign immunity because suit also named officers in official capacity and complaint sought prospective injunctive relief against ongoing violation of federal law).

CONCLUSION

As set forth above, the foregoing new authorities further demonstrate why petitioners have standing and a cause of action against the Department, *e.g. Patterson v. Alabama*, 294 U.S. 600, 607 (1935) ("in determining what justice [requires, appellate courts are] bound to consider any change, *either in fact or in law*, which has supervened since the judgment was entered") (emphasis added), thus further supporting this Court's granting the petition for a writ of *certiorari*.

May 9, 2005

Respectfully submitted,

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

Supreme Court, U.S.
FILED
JUN 30 2005
OFFICE OF THE CLERK

(4)

No. 04-922

IN THE

Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
MARQUETTE WRESTLING CLUB,
YALE WRESTLING ASSOCIATION, AND
COLLEGE SPORTS COUNCIL,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION,

RESPONDENT

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

QUESTIONS PRESENTED

Whether the courts below had the subject-matter jurisdiction – *i.e.*, an Article III case or controversy for which the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), waives sovereign immunity – that those courts needed to review the merits of the claim that respondent U.S. Department of Education unlawfully denied a petition to amend or repeal the "Three-Part Test"?

Whether – on the merits – respondent lawfully denied NWCA's petition to amend or repeal and whether a reviewing court can reach the merits in the absence of the administrative record?

PARTIES TO THE PROCEEDING

Petitioners National Wrestling Coaches Association ("NWCA"), Committee to Save Bucknell Wrestling ("CSBW"), Marquette Wrestling Club ("MWC"), Yale Wrestling Association ("YWA"), and College Sports Council ("CSC") were plaintiffs in the district court and appellants in the court of appeals. Respondent U.S. Department of Education ("USDE") was the defendant in the district court and the appellee in the court of appeals.

Pursuant to this Court's Rule 29.6, petitioners state that NWCA and CSC are non-profit corporations, CSBW, MWC, and YWA are nonprofit associations, and no publicly held company owns an interest of 10% or more in any petitioner.

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PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, as set forth in the accompanying certification of counsel and described below, petitioners respectfully ask this Court to rehear their petition to issue a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

JURISDICTION

This Court denied a timely filed petition for *certiorari* on June 6, 2005. 125 S.Ct. 2537 (2005). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

The petition appends 5 U.S.C. § 553(e). In pertinent part, 5 U.S.C. § 706 states that a reviewing "court shall review the whole record or those parts of it cited by a party."

STATEMENT OF THE CASE

This petition for rehearing concerns two aspects of the appellate court's reaching the merits of NWCA's petition-denial claim: (1) did the court have subject-matter jurisdiction to reach the merits (*i.e.*, did NWCA have standing and judicial review under the APA), and (2) did the appellate court properly evaluate the merits (*i.e.*, was USDE entitled to ignore substantive questions about its rule, and can a reviewing court proceed without the administrative record)? On the first question, under the unique circumstances here, this Court's reversing or affirming would enable further proceedings below. On the second question, the appellate court incorrectly deferred to procedurally defective administrative proceedings (*i.e.*, ones that failed to meet the statutory *minima*) and, in any event, should not have decided the merits against NWCA without the administrative record.

Statutory Background. In addition to its familiar notice-and-comment requirements, 5 U.S.C. § 553(b)-(c), APA § 4 also requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). Although less familiar, "[§ 553(e)] *is of the greatest importance* because it is designed

to afford every properly interested person statutory authority to petition for the issuance, amendment, or repeal of a rule." Administrative Procedure Act: Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess., at 359 (1946) (emphasis added) ("APA Leg. Hist.").

Congress considered 553(e) – like § 553's rulemaking provisions – to confer statutory rights: "[553(e) is] a most useful instrument of... protecting the public," *id.*, derived from the First Amendment: "[t]he right of petition is written into the Constitution itself. This subsection confirms that right where Congress has delegated legislative powers to administrative agencies." *Id.* Against the agency protest to "leav[e] action or inaction to the initiative of the agency concerned," *id.* at 21, the Senate Judiciary Committee noted that "[e]ven Congress, under the Bill of Rights, is required to accord the right of petition to any citizen," and "a petitioner [who] states and supports a valid ground for... relief, manifestly... should be entitled to... relief." *Id.*

Contrary to the *NWCA* panel's leaving the question open, App. 121a, Congress clearly envisioned that "[553(e)] applies not merely to effective rules... *but to proposed or tentative rules.*" *Id.* at 260 (emphasis added); *accord id.* at 201 ("this subsection applies to... proposed or tentative rules"). Where they publish "proposed or tentative rules," moreover, agencies must consider such petitions to modify those rules "because that is one of the purposes of publishing proposed or tentative rules." *Id.* at 201; *accord id.* ("[w]here such petitions are made, the agency must fully and promptly consider them"); *id.* at 359 ("No agency may receive such petitions in a merely pro forma manner. Every agency... will be required to set up procedures for the receipt, consideration, and disposition of these petitions."); *id.* at 260 ("[w]here such petitions are made, the agency must fully and promptly consider them," and "the agency must act on the petition in accordance with procedures set up and published in compliance with section 3(a)"); *see* 5 U.S.C.

§ 552(a)(1)(A), (C) (agencies must publish procedures and methods for making submittals).

The APA defines "agency action" to include "an agency rule, *order*,... or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). "Order" means:

> *the whole or a part of a final disposition*, whether affirmative, negative, injunctive, or declaratory in form, *of an agency in a matter other than rule making*[.]

Id. § 551(6) (emphasis added). An agency's petition denial is an order (*i.e.*, the final disposition of a petition).

> The term "agency action" brings together previously defined terms in order to simplify the language for judicial review provisions of Section 10 and *to assure the complete coverage of every form of agency power, proceeding, action, or inaction.*

APA Leg. Hist., at 197-98 (emphasis added); *id.* 255 (same). "[T]he term [agency action] *includes the supporting procedures*, findings, conclusions, or statements of reasons or basis for the action or inaction." *Id.* at 225 (emphasis added).

District Court Proceedings. In June 2003, the district court held that petition denials constitute a particularized injury, caused by the agency's denial, and redressable through a court-ordered remand, App. 82a, but that § 553 – and thus § 553(e) – does not apply to interpretive rules, App. 85a; *but see* 5 U.S.C. § 553(b)(A) (only *subsection 553(b)* does not apply to interpretive rules). The district court also held that USDE had limited the scope of the 1995-96 clarification proceeding, to which the court deferred. App. 85a.

In June 2004, petitioners moved the district court to reconsider its dismissal, based on both new evidence and changed circumstances. Rather than docket the motion, however, the court ordered briefing on its authority to entertain the motion absent the appellate mandate. In response, all parties agreed that – regardless of the appellate man-

date – the court had jurisdiction to entertain the motion.

In November 2004, the court docketed (but did not serve) the appellate mandate, without ruling on the Rule 60(b) motion. In petitioning for *certiorari* on January 6, 2005, petitioners understood that the Rule 60(b) motion still was pending, Pet. at iii, 7, which respondent did not dispute.

On March 1, 2005, citing *inter alia* the *res judicata* effect of the *NWCA* litigation, the district court dismissed a related case, which includes an undisputed petition denial. *College Sports Council v. Dep't. of Educ.*, 357 F.Supp.2d 311, 312-13 (D.D.C. 2005) ("*CSC*"). To find no standing for a petition-denial claim in *CSC*, the court cited two decisions that predate the appellate *NWCA* decisions – *Gettman v. DEA*, 290 F.3d 430, 432-33 (D.C. Cir. 2002) and *Hydro Investors, Inc. v. FERC*, 351 F.3d 1192, 1196-97 (D.C. Cir. 2003) – which find no standing for petition denials where the court could not possibly remedy the underlying injury. On a threshold jurisdictional issue, therefore, *CSC* and *NWCA* conflict.

Court of Appeals Proceedings. In affirming the district court's merits dismissal of NWCA's petition-denial claim in May 2004, the *NWCA* panel did not discuss standing and declined to address "whether the Three-Part Test is the type of policy subject to the APA's petition requirements." App. 121a. *CSC* is docketed as No. 05-5133 (D.C. Cir.).

REASONS TO GRANT THE WRIT

1. The decisions below conflict with this Court's supervening *Tenet v. Doe* decision, its recent *Steel Co.* decision, and numerous appellate decisions on the need to resolve threshold jurisdictional issues before reaching the merits.

2. By reaching the merits on the *NWCA* petition claim, but not the *CSC* petition claim, and by withholding reconsideration in the *NWCA* litigation (presumably based on the *NWCA* merits mandate), the courts below have manufactured inconsistent – and unjust – rulings, which this Court can remedy either by striking the appellate court's merits

holding as lacking subject-matter jurisdiction or, instead, by authoritatively holding that the courts below had subject-matter jurisdiction to reach the merits. The former would remove the district court's basis for declining to rule on the *NWCA* Rule 60(b) motion, and the latter would ensure a merits review of the *CSC* petition-denial claim.

3. The decisions below negate the important rights that Congress conferred in § 553(e) and instead empower agencies to circumvent the APA. This Court's review would vindicate the public's rights under § 553(e).

I. SUBJECT-MATTER JURISDICTION

The *NWCA* panel reached the merits without determining whether the APA waives sovereign immunity for review of petition denials for rules like the Three-Part Test. App. 121a. With its refusing to accept NWCA's naming the federal offices (*e.g.*, Secretary) as invoking the legal fiction of *Ex parte Young*, *see* Fed. R. App. P. 43(c)(1); Pet. 22-24; Reply Br. 8-9 & n.7; Suppl. Br. 8-9, however, the *NWCA* panel erred. *Compare Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-101 (1998) (courts must address threshold jurisdictional issues before merits issue of availability of cause of action) *with Tenet v. Doe*, 125 S.Ct. 1230, 1235 n.4 (2005) (including waiver of sovereign immunity among threshold issues that courts may decide before reaching merits);[1] *cf. Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) ("a federal court [may] choose among threshold grounds for denying audi-

[1] *See also, e.g., U.S. ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1155-56 (2nd Cir. 1993) (court to consider 12(b)(1) jurisdictional challenges before merits challenges); *Hardemon v. Boston*, 144 F.3d 24, 25-26 (1st Cir. 1998) (declining to "bypass the jurisdictional issue" to reach merits); *U.S. v. Texas Tech Univ.*, 171 F.3d 279, 286-87 (5th Cir. 1999) ("To rule on a merits question before, or in addition to, answering the omnipresent jurisdictional question would contravene the well-established principle that the federal courts may not issue advisory opinions"); *Cunningham v. R.R. Ret. Bd.*, 392 F.3d 567, 570-71 (3rd Cir. 2004) ("must resolve the threshold jurisdictional issue before reaching the merits").

ence to a case on the merits"). Under the *NWCA* holding,because NWCA sued only the United States – *i.e.*, USDE and federal *offices*, not federal *officers* – NWCA needed the APA waiver of sovereign immunity for its action. App. 117a. Without an *APA cause of action*, NWCA lacks an *APA waiver of sovereign immunity*, and (by its own reasoning) the *NWCA* panel lacked jurisdiction to reach the merits. *Cf. Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 126-27 (1804) (setting aside defense judgment at the instance of losing plaintiff who failed to allege the basis for federal jurisdiction).

A. Standing. Standing involves a tripartite test of injury, causation, and redressability, and while directly inflicted injuries pose "little question" of causation or redressability, the plaintiff has a heightened showing when government action affects third parties, who then cause injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

The APA confers procedural rights, APA Leg. Hist. at 278 ("procedural rights conferred by this bill"), 359 ("a most useful instrument of... protecting the public"), the denial of which causes a cognizable injury. *Warth v. Seldin*, 422 U.S. 490, 514 (1975). For such procedural injuries, "those adversely affected... generally have standing to complain." *FEC v. Akins*, 524 U.S. 11, 25 (1998).

Although the agency on remand may reach the same result, *id.*, the initial injury remains "fairly traceable" to the procedurally defective initial action and redressable by an order striking the initial agency action, *id.; Defenders of Wildlife*, 504 U.S. at 573 n.7 (procedural-injury plaintiff need not show that, but for the procedural lapse, agency would reach different substantive result). Instead, plaintiffs "accorded a procedural right to protect [their] concrete interests" need show only a sufficiently concrete relationship between the procedural step and the substantive result, and the redressability and immediacy requirements apply to the *present procedural violation*, which may injure the concrete interest, rather than to the concrete (but less certain) future injury. *Id.*

Under the foregoing standards, USDE's refusal to include within its 1995-96 rulemaking a procedure under which NWCA could petition to repeal the Three-Part Test violated NWCA's procedural rights under APA § 4. This is particularly true under statutes (such as Title IX) that Congress patterned after Title VI because Congress expressly considered judicial review of agency rules, regulations, and orders as a procedural protection against agencies' overreaching, to the disadvantage of equal-protection rights. *See* Pet. at 21 & n.14 (citing legislative history).

B. APA Review. The APA provides review of agency action made reviewable by statute and final agency action for which there is no adequate remedy. 5 U.S.C. § 704. Denial of a petition to amend or repeal a rule clearly is agency action, as the APA broadly defines that term, *see* Statutory Background, *supra*, and as it has been interpreted. *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980) (issuance of a complaint is the "final disposition" of whether the agency has reasonable cause to issue the complaint); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51-52 (1955) (APA provides judicial review of agency's final order, even if that review is not the last available remedy). Judicial review is particularly appropriate for challenges to a rule's ongoing rationality, because the petition process is the only way to bring such challenges. *Auer v. Robbins*, 519 U.S. 452, 458 (1997).

Bennett v. Spear sets a two-prong test for determining whether agency action is *final:* (1) it "must mark the 'consummation' of the agency's decision making process" and not be "merely tentative or interlocutory" in nature; and (2) it "must be one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. 154, 177-78 (1997) (citations omitted); *cf. Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 n.4 (1986) ("there has been 'final agency action,' in that the Secretary formally has agreed... that there will be no certification"); *cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990) (rec-

ognizing APA challenge to "some specific order or regulation, applying some particular measure across the board to all individual [actions]"); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 495 (1991) (allowing judicial review that would entitle appellants to reconsideration under new procedures). Denial of a petition clearly is *final*, assuming *arguendo* that § 704's finality test even applies: every appellate court to reach the issue has found *statutory* review, outside the adequate-remedy bar. *See* Pet. at 22 & n.15; Reply Br. at 7.

II. MERITS

A. Refusal to Entertain Petition. By letter dated October 20, 1995, NWCA petitioned the Hon. Norma V. Cantú, Assistant Secretary for Civil Rights, to change the Three-Part Test both because it exceeded the intent of Title IX and because the circumstances that may have justified its adoption in the 1970s no longer applied. App. 257-58a. (¶¶ 74-75). For purposes of § 553(e), a "petition" includes a letter asking an agency to change a rule, *Am. Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987), or to change a *proposed or tentative rule*, APA Leg. Hist., at 201, 260 (quoted at 2, *supra*). Although the 1996 Clarification acknowledged that parties suggested that the Three-Part Test "provided more protection... than intended by Title IX," USDE simply sidestepped these issues: "it would not be appropriate to revise the 1979 Policy Interpretation." App. 174a (1996 Clarification).

The courts below rely on *Edison Elec. Inst. v. I.C.C.*, 969 F.2d 1221 (D.C. Cir. 1992) ("*EEI*"), for the proposition that "barring extreme arbitrariness, we defer to the agency's decision regarding the management of its own docket." *EEI*, 969 F.2d at 1230 (*citing Nader v. FCC*, 520 F.2d 182, 195-96 (D.C. Cir. 1975)). *Nader*, in turn, relied on this Court's *Schreiber* decision to hold that "regulatory agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *Nader*, 520 F.2d at 195-96 (*quoting FCC v. Schreiber*, 381 U.S. 279, 289 (1965)). *Schreiber* and its

primary authority – *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940) – provided the authority for this Court's seminal *Vermont Yankee* decision. *See Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 524-25 (1978) (*apart from APA*, "formulation of procedures... basically... left within the discretion of the agencies" and emphasizing this Court's "cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies").

In sum, the courts below rely on a line of precedents as indisputable as it is inapposite. These cases involve *adjudications* where the reviewing courts refused judicially to impose procedural enhancements *in excess* of statutory requirements. Petitioners have no quarrel with this line of cases, but dispute its application here, to a *rulemaking* proceeding conducted without the APA's statutory *minima*. APA Leg. Hist. 201, 260, 359 (requiring agencies to have a process for considering petitions and to respond to any petitions received) (quoted in Statutory Background, *supra*). Simply put, *Vermont Yankee* has no bearing here. *See, e.g., U.S. Lines, Inc. v. Fed'l Maritime Comm'n*, 584 F.2d 519, 540 (D.C. Cir. 1978) ("agency is not free, however, to structure its procedures in violation of applicable statutory requirements"); *U.S. v. Dart*, 848 F.2d 217, 230-31 (D.C. Cir. 1988) ("selective application of the APA is inappropriate, for it undermines protections for the individual citizen that were elsewhere included in that carefully balanced statute").[2]

---

[2] Even if it applied to agencies' avoiding APA procedures to evade review, *EEI* still would not apply by its own terms. The *EEI* court faulted EEI for failing to submit its comments to the docket that addressed the agency's statutory authority (*i.e.*, for submitting its comments to the *wrong* docket). *EEI*, 969 F.2d at 1229; 52 Fed. Reg. 32,613 (1987). Here, USDE's *Federal Register* notice expressly solicits "public comment on whether the draft Clarification provides adequate clarity in areas that have generated questions." 60 Fed. Reg. 51,460 (1995). Given that USDE statutorily must identify its authority for every rule, 20 U.S.C. § 1232(b), and that USDE's authority for the Three-Part Test clearly had "generated questions," *e.g.*,

B. Denial of Petition. USDE's cursory petition denial and the absence of the administrative record deprives a reviewing court of any basis on which to affirm USDE's action. First, where an agency leaves the court with "no findings and no analysis... to justify the choice made,... [w]e are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice." *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 167 (1962). Second, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), this Court recognized that APA review requires "the 'whole record' compiled by the agency: the basis for review required by § 706 of the [APA]" and remanded for further proceedings "based on the full administrative record that was before the Secretary at the time he made his decision," *Id.* at 419-20, supplemented by discovery if "additional explanation" was necessary. *Id.* at 420-21; *cf. SEC v Chenery Corp.*, 318 U.S. 80, 94 (1943) ("courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review").

CONCLUSION

This Court should grant the writ of *certiorari*.

June 30, 2005

Respectfully submitted,

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

Cohen v. Brown Univ., 991 F.2d 888, 899-900 (1st Cir. 1993); App. 249-50a (¶¶ 39-40) (congressional inquiries into whether Three-Part Test exceeds legislative intent for Title IX), USDE's statutory authority was a question presented within the 1995-96 rulemaking. Finally, unlike EEI's sending its comments to the wrong docket, NWCA sent its petition directly to the person with the authority to grant it (Assistant Secretary for Civil Rights Cantú), not to Ms. Jeanette J. Lim, the "docket" designated for comments on USDE's clarification. *See* 60 Fed. Reg. at 51,460. Even under *EEI*, therefore, NWCA sent its petition to the right "docket."

COUNSEL CERTIFICATION

Pursuant to this Court's Rule 44.2, and as specifically set out below, the undersigned counsel for the petitioners in *Nat'l Wrestling Coaches Ass'n v. Dep't. of Educ.*, No. 04-922 (U.S.) ("*NWCA*"), certifies that the grounds proffered in the accompanying Petition for Rehearing are limited to intervening circumstances of a substantial or controlling effect and to other substantial grounds not previously presented.

1. The Petition for Rehearing concerns the petition-denial claim, App. 257-58a (¶¶ 71-77), on which the courts below reached the merits, App. 85a, 121a, without the appellate panel's considering standing or the waiver of sovereign immunity, App. 121a, the exclusive focus of the balance of their opinions.

OTHER SUBSTANTIAL GROUNDS

2. The Petition for Rehearing sets forth substantial grounds based on the legislative history and purpose of the Administrative Procedure Act's petition process, 5 U.S.C. § 553(e), which were not previously presented. This issue has significance not only to the private parties here but also to the public generally, as it concerns the public right administratively to participate in rulemaking proceedings and agency prerogatives to circumvent that right.

3. To the extent that this Court determines that there is subject-matter jurisdiction for the petition-denial claim, the legislative history of § 553(e) counsels against accepting the *NWCA* panel's deference to the Department of Education's refusal to consider questions to its authority for, and the continuing rationality of, its Three-Part Test. Further, the courts below could not hold that the Department did not consider the relevant letter a "petition" without reviewing the administrative record.

INTERVENING CIRCUMSTANCES

4. After the petition for *certiorari* was filed in January 2005, this Court decided *Tenet v. Doe*, 125 S.Ct. 1230 (2005),

and the same district court judge dismissed *College Sports Council v. Dep't. of Educ.*, 357 F.Supp.2d 311 (D.D.C. 2005) ("*CSC*") for lack of subject-matter jurisdiction.

Inconsistent – and Unjust – Rulings

5. The *CSC* litigation includes the five *NWCA* petitioners, two new plaintiffs, the U.S. Department of Education, and three new federal defendants (the United States and two named officers, served in both their official capacities and their individual capacities under color of legal authority). The *CSC* litigation also includes an unambiguously presented and unambiguously denied petition for the repeal of the "Three-Part Test." Thus, if the *NWCA* panel had subject-matter jurisdiction to reach the *NWCA* petition-denial claim, the *CSC* litigation presents subject-matter jurisdiction.

6. Even if a petition-denial claim does not *per se* provide justiciability (as the district court initially held, App. 82a), petitioners contend that the *CSC* pleadings, as well as the June 2004 *NWCA* motion for reconsideration pursuant to Fed. R. Civ. P. 60(b), cure the pleading defects identified by the *NWCA* panel. Although petitioners understood that their Rule 60(b) motion still was pending in January 2005, *see* Pet. at iii, 7, the district court's *CSC* dismissal signals that the district court essentially "pocket vetoed" that motion by withholding it from the docket until the appellate mandate came down in November 2004.

7. The *CSC* litigation is now docketed as No. 05-5133 (D.C. Cir.), and the federal parties have moved for summary affirmance, D.C. Cir. Rule 27(g), based on the *NWCA* litigation's *res judicata* effect in all respects except the justiciability of petition-denial claims. On petition-denial claims, the federal parties cite two decisions that predate the appellate *NWCA* decisions – *Gettman v. DEA*, 290 F.3d 430, 432-33 (D.C. Cir. 2002) and *Hydro Investors, Inc. v. FERC*, 351 F.3d 1192, 1196-97 (D.C. Cir. 2003) – in which petition-denial claims did not support standing where the court could not

remedy the underlying injury (*i.e.*, the challenged ruling was controlling as a matter of law on the challenged agency and the object of the litigation was valueless, respectively).

8. As a result of the district court's inaction on the *NWCA* Rule 60(b) motion and action in the *CSC* litigation, the petitioners now seek either an authoritative vacating of the *NWCA* merits holding for lack of subject-matter jurisdiction (thereby removing the perceived obstacle to a ruling on their Rule 60(b) motion) or an authoritative ruling that subject–matter jurisdiction exists (thereby ensuring a merits hearing in the *CSC* litigation).

Reaching Merits without Subject-Matter Jurisdiction

9. Although petitioners do not know whether the *NWCA* panel was aware of *Gettman* and *Hydro Investors*, but declined to cite them to enable reaching the merits, petitioners do know that Judge Henderson of the 2004 *NWCA* panel also served on the 2002 *Gettman* and 2003 *Hydro Investors* panels. 290 F.3d at 431; 351 F.3d at 1193.

10. Whether or not the *NWCA* panel intended to avoid the issue of standing for petition-denial claims, it expressly declined to address the issue of whether § 553(e) applies to agency actions such as the Three-Part Test. App. 121a. But under its own sovereign-immunity reasoning and under this Court's supervening decision in *Tenet v. Doe*, the *NWCA* panel lacked subject-matter jurisdiction to reach the merits.

11. *Tenet* confirmed that the absence of a waiver of sovereign immunity is among the threshold jurisdictional issues that a court must reach before reaching the merits. 125 S.Ct. at 1235 n.4; *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-101 (1998) (courts must address threshold jurisdictional issues before merits issue of availability of cause of action).

12. The *NWCA* panel faulted petitioners for naming the federal offices (*e.g.*, Secretary) in their attempt to invoke the legal fiction of *Ex parte Young* and instead confined petition-

ers to the APA waiver of sovereign immunity. *See* Fed. R. App. P. 43(c)(1); Pet. 22-24; Reply Br. 8-9 & n.7; Suppl. Br. 8-9. Under its own sovereign-immunity reasoning, therefore, the *NWCA* panel's failure to identify an *APA cause of action* necessarily also left the *NWCA* panel without an *APA waiver of sovereign immunity*. With no waiver, the *NWCA* panel lacked the subject-matter jurisdiction necessary to reach the merits.

June 30, 2005

Respectfully submitted,

LAWRENCE J. JOSEPH
2121 K Street, NW, Suite 800
Washington, DC 20037
Tel: 202-669-5135

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No. 04-922

IN THE

Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
MARQUETTE WRESTLING CLUB,
YALE WRESTLING ASSOCIATION, AND
COLLEGE SPORTS COUNCIL,

Petitioners,

v.

DEPARTMENT OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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No. 04-922

IN THE

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NATIONAL WRESTLING COACHES ASSOCIATION,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
MARQUETTE WRESTLING CLUB,
YALE WRESTLING ASSOCIATION, AND
COLLEGE SPORTS COUNCIL,

Petitioners,

v.

DEPARTMENT OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. Its

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

general mission includes education and legal efforts directed towards promoting individual liberty and free enterprise. Specifically, EFELDF has strived for years to defend and protect educational opportunity. EFELDF has long been an advocate for enhancing opportunities for women without ignoring important differences between the genders. EFELDF has successfully filed *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals, including the proceeding below. EFELDF also participates in educating and training students of all ages.

Amicus curiae has a direct and vital interest in the issues presented to this Court based on an active participation in education for over two decades, and respectfully submits this brief in support of the Petition.

SUMMARY OF ARGUMENT

Petitioners have standing to challenge unlawful government policies that adversely affect them. Where, as here, government has promulgated a policy that embraces gender quotas, those harmed by schools attempting to satisfy the quotas have standing to challenge it. In dismissing Petitioners' complaint on standing and redressability grounds, the decision below contravened precedents of this Court and conflicted with other Circuits.

Gender quotas are contrary to applicable statutes. The federal government has unlawfully authorized and encouraged a gender quota through creation of a safe harbor for schools. Grievances suffered by Petitioners by virtue of a federal safe harbor for gender quotas in school sports are actionable in federal court.

Specifically, Petitioners have standing to challenge the "proportionality test" that encourages colleges to reduce the proportion of men on their sports teams to the overall proportion of men enrolled as students. 44 Fed. Reg. 71,418 (the first prong of the 1979 Policy Interpretation directs that "in-

tercollegiate level participation opportunities for male and female athletes [be] provided in numbers substantially proportionate to their respective enrollments") (as reaffirmed in 1996 and 2003). The proportionality test imposes a quota requiring the gender ratio of athletes on competitive teams to match the gender ratio enrolled in the school.

College wrestling, an extremely inexpensive sport, has suffered a calamitous drop of 171 teams over two decades as schools eliminate large-squad men's teams to reduce their numbers relative to the women athletes. When Howard University drops both its baseball and wrestling teams in the face of this policy, the affected students have standing to challenge the policy. The same standing exists for students suffering from the elimination of teams at other schools, including Yale and Marquette as represented by Petitioners, and their injury is redressable by invalidating the quota policy.

As recognized by the dissent below, the panel majority contravened well-established precedents in holding that where third parties (schools) are inflicting the damage, the victims may not challenge the government policy that encourages and protects the wrongful conduct. Unless overturned, the holding below promises to create havoc in the ability of persons to challenge and overturn unlawful government policies that cause injury to them.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH RULINGS OF THIS COURT AND OTHER CIRCUITS CONCERNING STANDING.

The allegations in the complaint, taken as true, thoroughly satisfied the requirement for standing prevailing in most Circuits. As Judge Williams explained below in dissent:

> The complaint clearly alleges that the Department regulations and policies represented a 'substantial factor' in educational institutions' decisions on the number and composition of sports teams. Paragraph 48 of the First Amended Complaint says that either as a direct result of the Department's enforcement action or in order to avoid becoming the target of such action, educational institutions 'have limited male participation opportunities to comply with [the Department's] unlawful Title IX policies,' and that as a result of these policies institutions 'have cut (*i.e.*, eliminated) hundreds of men's teams and have capped (*i.e.*, arbitrarily limited) hundreds of men's participation opportunities.' The First Amended Complaint (PP 50-52) also specifically alleges that wrestling teams at Bucknell, Marquette and Yale were eliminated in order to comply with the Department's Title IX policies.

National Wrestling Coaches Ass'n v. Dep't of Ed., 366 F.3d 930, 952 (D.C. Cir. 2003) (Williams, J., dissenting). This easily satisfies the requirement for standing of cognizable injury to members as set forth by this Court and followed by the majority of Circuits. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 342-44 (1977); *see also United Food and Commercial Workers Union Local 751 v. Brown Group Inc.*, 517 U.S. 544, 551-58 (1996); *Air Transport Ass'n of Am. v. Reno*, 80 F.3d 477, 483-85 (D.C. Cir. 1996).

In granting the Respondent's motion for dismissal, the decision below conflicts with these precedents by denying court access to persons aggrieved by a government policy that violates its statutory mandate and causes Petitioners injury. Title IX mandates that no one "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" on account of sex. 20 U.S.C. § 1681(a). Yet the "proportionality test," 44 Fed. Reg. 71,418, does dis-

criminate based on a numerical, quota-like system causing the elimination of many teams and athletes based on gender.

The United States General Accounting Office (GAO) studied the conduct of college athletic departments between 1992-93 and 1999-2000. The GAO's estimates, which understate the problem, found that colleges discontinued 171 intercollegiate men's sports teams during that period. Joint Appendix below [hereinafter, "JA"] at 372. Because it did not even address capping, whereby non-scholarship students on men's teams are cut to advance the goal of proportionality with women athletes, the GAO report overlooked the additional amount of men's athletic opportunities lost due to the proportionality test. College athletic directors candidly admitted in the GAO survey that "Gender Equity Goals/Requirements" were one of the most significant factors causing the elimination of men's teams. JA 378.

The GAO report demonstrates that colleges eliminated many teams to satisfy "requirements" of gender equity, satisfying the causation element of standing. *Id.*; *Joseph v. United States Civil Serv. Comm'n,* 554 F.2d 1140, 1145 (D.C. Cir. 1977) ("The injury need not be substantial. A trifle is enough for standing."). Had the Department of Education authorized colleges to discriminate by race in an analogous manner, there would be no doubt that standing would exist. Congress did not remove jurisdiction from the federal courts over this issue, and courts should not abdicate it on their own. An official encouragement or authorization to engage in numerical balancing is reviewable, particularly when the statute itself so clearly prohibits the policy at issue. 20 U.S.C. § 1681. Petitioners should not have lost their day in court because of "unadorned speculation" as held by the court below. 366 F.3d at 938, 943, 944 (quotations omitted). Petitioners more than met their pleading requirements for standing.

Where, as here, the conduct causing injury would have been illegal in the absence of the government action, there is standing by the victims to contest the policy. The Department

of Education has replaced legitimate demand for competitive sports by students with a mathematical formula contrary to the spirit and letter of the statutory mandate. The casualties are men and women alike. Popular men's teams are eliminated in favor of sparsely attended women's teams, many of which flounder or disband due to lack of participation. Women's crew teams, with the potential for large squad sizes, are being promoted by colleges at the expense of smaller but more popular women's sports. It does not help women to offer a sport that does not even exist at the vast majority of high schools. Men's wrestling teams, in contrast, are often eliminated because of their large squad sizes, notwithstanding that they have relatively small costs. Indeed, even *self-funded* teams cannot play in this numbers game.

At issue here is government control at its worst, wholly unsupported by statutory authority. A school perhaps would consider replacing its small, but popular, women's gymnastics team with a larger crew team, made up of women with no crew experience or interest. If it did so, the gymnasts, active in their sport since early childhood, could try to reason with their school. Absent the challenged Title IX policies, the school could meet their needs and assert its right to education autonomy. *See Grutter v. Bollinger,* 539 U.S. 306, 328-30 (2003). However, the Department of Education has severely limited that dialogue with women student athletes, and has virtually precluded any meaningful dialogue with male student athletes. Given that it acted outside the Administrative Procedure Act rulemaking requirements and brushed aside questions of its legal authority, it is no wonder that the Department acted *ultra vires.*

While Title IX requires equal opportunity, the Department of Education unlawfully mandates equal participation as an end in itself. *See Freeman v. Pitts,* 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"). This Court has called it "nonsensical" to measure alleged discrimination by comparing participation levels from highly

specialized pursuits with a general population, which is what the proportionality test essentially encourages. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, § 105, 105 Stat 1074-1075, 42 U.S.C. § 2000e-2(k) (1994 ed.); *cf. Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 997 (1988) ("statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value"). The proportionality test enshrines the overall student population at a school as the yardstick for athletic opportunity, disregarding the massive evidence that students entering college may have formed divergent levels of interest in intercollegiate athletic competition. *See, e.g.*, JA 262-70, 364. This policy encourages illegality, as any appropriate discrimination analysis requires comparison with the qualified applicant pool, not the general population. *See, e.g., Mayor of Philadelphia v. Educational Equity League*, 415 U.S. 605, 620 (1974); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989).

Neither experience nor logic nor the law supports the view that male and female demand for competitive sports must be identical. Women do not have as great an interest in team sports as men do, and the converse is true for many extracurricular activities. JA 262-63. It is scientific, not stereotypical, to survey students and observe their differences in interests and needs by gender. To no one's genuine surprise, surveys show that high school senior boys are far more physically active than high school senior girls are. For example, the Department's National Center for Educational Statistics ("NCES") polled high school seniors who "actively participate in sports, athletics or exercising [e]very day or almost every day" over a fifteen-year period from 1980 to 1994. By a wide twenty percent margin, males were more active than females in athletic activity. *Id.* at 263. Similarly, males exercise vigorously (e.g., jogging, swimming, calisthenics, or other active sports) in much higher percentages than females

do. *Id.* In 1992 and 1993, over twice as many high school males exercised as vigorously as females. *Id.* This is a genuine difference in athletic interest, encompassing exercise beyond available competition. *See* John Tierney, "Why Don't Women Watch Women's Sports?," Week in Review, *N.Y. Times* (June 15, 2003) ("The audience for this year's championship game in women's college basketball was 57 percent male, according to Nielsen Media Research. Annika Sorenstam's appearance in the Colonial golf tournament last month may have been a giant leap for women, but 65 percent of the witnesses were men.").

Men and women are no more likely to have identical interests in competitive sports in college than they were in high school, where their interests diverged by a wide margin. JA 263. Surely one would not expect the fans at a typical professional sporting event to be split evenly between men and women. Title IX does not require equal intercollegiate competition, nor can the Department of Education lawfully encourage such a goal.

This Court has made clear that indirect injuries based on government policies or authorizations suffice to establish standing to challenge them. *See Data Processing Serv. v. Camp*, 397 U.S. 150, 152 (1969); *see also Investment Co. Inst. v. Camp*, 401 U.S. 617, 620-21 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Barlow v. Collins*, 397 U.S. 159, 162-63 (1970).

The coaches and students adversely affected by this unjustified policy have standing to challenge it, as do their associations such as Petitioners. The court below departed from the precedents of this Court and the other Circuits by denying standing "[b]ecause the necessary elements of causation and redressability in such a case hinge on the independent choices of the regulated third party." 366 F.3d at 938. The government's gender quota in the proportionality test defines a safe harbor for schools from enforcement actions by government or litigation brought by private parties. There are not "inde-

pendent choices" in a meaningful sense of the phrase for schools to seek to qualify for this safe harbor. Petitioners have standing to challenge the policy that encourages schools to discriminate against them.

Petitioners also satisfied the associative requirements for standing. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 281 (1986) ("It has long been settled that even in the absence of injury to itself, an association may have standing solely as the representative of its members") (quotations omitted). *See also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973) (finding that the environmental group had standing to challenge an agency decision that adversely affected the group's members); *National Lime Ass'n v. EPA*, 233 F.3d 625, 636-37 (D.C. Cir. 2000) (holding that a trade association had standing to challenge a rule, even if some of its members support the rule).

II. THE DECISION BELOW DEPARTS FROM THE STANDARD FOR REDRESSABILITY.

The trial court erred in finding a lack of redressability. "Here, there is no direct action DoE could take in new Rule-making which would force education institutions to redress plaintiffs' alleged injuries." *National Wrestling Coaches Ass'n v. Department of Ed.*, 263 F.Supp.2d 82, 115 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004). That is plainly false. The court could prohibit adherence to the Department's encouragement of numerical balancing by enforcing Title IX as written, and colleges would surely stop relying on the proportionality test. Schools would not impose quotas if the government did not allow them. Instead, schools would allocate athletic opportunities under the more-flexible regulatory standard of equal opportunity, based on interest. *See* 34 C.F.R. § 106.41(c)(1). Legitimate student interest in competi-

tive sports would then be better served, and the scourge caused by quotas would diminish.

Yet the court below implicitly held that colleges might discriminate in the absence of the Department's interpretation, and that Petitioners therefore lack a redressable claim. If so, then many forms of official encouragement to discriminate would be immune from legal challenge. Nevertheless, this is not the law, as such encouragement reduces opportunity, and lost opportunity is redressable. *See, e.g., Competitive Enter. Inst. v. NHTSA,* 901 F.2d 107, 113 (D.C. Cir. 1990) ("We determined that a lost opportunity to purchase vehicles of choice is sufficiently personal and concrete to satisfy Article III requirements"); *Center for Auto Safety (CAS) v. NHTSA,* 793 F.2d 1322, 1332-33 (D.C. Cir. 1986) (holding that a decrease in opportunity to purchase certain types of vehicles constituted injury in fact and established standing). This is particularly true where government action robs groups like Petitioners of the opportunity even to compete by placing them on an unequal footing versus a government-favored class. *Gratz v. Bollinger,* 539 U.S. 244, 261-63 (2003); *Dynalantic Corp. v. Department of Defense*, 115 F.3d 1012, 1016 (D.C. Cir. 1997). The proportionality test authorizes and encourages numerical balancing by colleges, and Petitioners have standing to challenge that authorization and encouragement.

The 1996 Clarification to the proportionality rule included the following statement in its letter of transmittal: "The rules here are straightforward. ***An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test.*** However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men." Letter from Norma V. Cantu, Assistant Sec'y, Office for Civil Rights, Dep't of Educ. (Jan. 16, 1996) at 4 (JA 146) (emphasis added). While this arguably may not require capping the number of participants on teams, it certainly does **authorize** it. Colleges are thereby authorized and

encouraged by government to reduce opportunities to men in order to meet the gender quota in part one of the three-part test. Removing that governmental authorization and promotion would surely end the pressure to eliminate men's teams for proportionality purposes, bringing relief to members of Petitioners.

III. THE DENIAL OF STANDING FOR REVIEW OF THE GENDER QUOTA EMBODIED IN THE "PROPORTIONALITY TEST" IS AN ISSUE OF HEIGHTENED NATIONAL IMPORTANCE.

Government quotas, racial or gender, is an issue of heightened national importance. *See, e.g., Gratz v. Bollinger*, 539 U.S. at 259 (2003) (invalidating a school's admission criteria described by the trial court as "the functional equivalent of a [racial] quota"). If unchecked, the gender quota in the "proportionality test" will continue to cause sweeping injustices and discrimination in colleges nationwide, and is already being applied to public high schools. Title IX quotas as now imposed even limit the use of privately raised funds to support school sports. *See* "Attack on freedom of association," *Chattanooga Times Free Press* (Tennessee), B7 (Nov. 29, 2004) (to comply with Title IX, privately raised funds must be equally distributed to boys' and girls' teams).

Discrimination inspired by the gender quotas is pervasive at the collegiate level. At Howard University, for example, male enrollment has dropped to less than 40% of its student body, and the government proportionality test encourages it to eliminate men's teams until fewer than 40% of its intercollegiate athletes are male. In 2002, it simultaneously eliminated both its varsity wrestling and baseball teams, leaving in the lurch its numerous athletes in those sports. Its wrestling coach Wade Hughes observed, "Howard University would like to look at this as a non-Title IX issue, but from my perspective, it is a Title IX issue in gender equality." Mark

Asher, "Howard Drops Baseball, Wrestling," *Washington Post,* D1 (May 23, 2002). Athletic Director Sondra Norrell-Thomas said it was due to a lack of facilities, but the wrestling coach pointed out that all the sport needs is a simple wrestling room, which they obviously had. *Id.* The athletic director could not deny it. *Id.* "Enrollment at [the University of Honolulu]-Manoa is 42 percent male and 58 percent female; thus, UH-Manoa has no men's soccer team or water polo team, but UH provides soccer and water polo teams for women; thus, many local boys who would have relied on those positions to attend college join thousands of minority men nationwide who are not able to go to college because of Title IX." Gerald Nakata, "Title IX is a Disservice to Males," *The Honolulu Advertiser*, 7A (Mar. 8, 2005).

Enforcement of Title IX quotas through the private cause of action has caused pervasive elimination of wrestling teams at colleges and universities. Michael Yount, "Football: The 800-Pound Gorilla in College Athletics," *The Salt Lake Tribune*, A1 (June 15, 2003) ("There were 363 NCAA wrestling teams in 1981 and 225 by the end of 2001. Men's gymnastics was never widely sponsored at the university level, but only 24 NCAA programs remained by 2001. BYU dropped both sports at the end of the 2000 school year."). In 1981-82, 52.7% of NCAA Division I colleges had a wrestling team. By 2000-01, only 27.1% of colleges did. *See* NCAA Sport-by-Sport Participation and Sponsorship - Men's Sports 1982-2001, at 119.[2] Despite a substantial increase in the number of colleges in the NCAA Division I during that period, the number of athletes competing in wrestling declined from 3,659 to 2,662. *Id.* Similar declines occurred in NCAA Divisions II and III.

Overall, the number of colleges in the NCAA increased from 787 to 1,049 from 1981-82 to 2000-01, yet the number

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[2] *See* http://www.ncaa.org/library/research/participation_rates/1982-2001/091-120.pdf (viewed Oct. 4, 2004).

of wrestlers declined from 7,914 to 5,966. *Id.* This decline is due not to high costs of wrestling (it is inexpensive) nor to any decline in demand, which remains high as reflected by the continuing popularity of high school programs. *See* National Federation of State High School Associations Participation Study 1971-01, at 191.[3]

The private cause of action has forced schools even to eliminate self-funded wrestling teams that impose no burden on the institution. *See* "Has Title IX's quest for equality gone too far? Title IX was designed to ensure equal opportunities for girls in school sports, but some say it has unintentionally hurt boys' teams," *New York Times Upfront* (Apr. 18, 2003). Why? Because private lawsuits enforce the informal quotas in a way that the Executive Branch never would.

The private litigants demand the "proportionality" that encourages colleges to reduce the proportion of men on sports teams to the overall proportion of men enrolled as students. 44 Fed. Reg. 71,418 (the first prong of the 1979 Policy Interpretation directs that "intercollegiate level participation opportunities for male and female athletes [be] provided in numbers substantially proportionate to their respective enrollments"). This bean-counting approach favors sports with large squad sizes for women, and reducing men's squad sizes or completely eliminating their teams. Petitioners have standing to challenge a government policy that incites and supports private causes of action, to their detriment.

The March 2001 General Accounting Office (GAO) report bears this out. In the 1980s and 1990s, women's sports with large squad sizes ballooned. *See* United States General Accounting Office (GAO), "Intercollegiate Athletics, Four-Year Colleges' Experiences Adding and Discontinuing Teams," GAO-01-297 [hereinafter, *GAO Report*] 12 (Mar.

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[3] *See* http://www.ncaa.org/library/research/participation_rates/1982-2001/175-192.pdf (viewed Oct. 4, 2004).

2001). Rowing (crew) is an example. It features the largest average squad size for women, an enormous 46.3 members per team. *Id.* at 9-12. The number of these teams increased by 184% during this time period, despite little to no interest at the high school level. *Id.* at 12. The University of Massachusetts women's rowing coach, Jim Dietz, bluntly admitted, "The reason we're here – everybody knows it – is for gender equity." Jessica Gavora, *Tilting the Playing Field* 66 (2002). Women's water polo, another large-squad-size sport, increased for women by 3,600%. *GAO Report* at 12. Women's equestrian teams, boasting an average squad size of 26.2, exploded with a 486% increase as athletic directors seek numerical balancing. *Id.* at 9-12. These increases result not from a boom in high school demand for these opportunities, but from colleges' attempt to boost women's participation numbers.

Meanwhile, a historically popular sport for women suffered the consequences of playing-by-the-numbers. Gymnastics fell by 53% during this time period. *Id.* at 12. During a time when Title IX required massive expenditures on women's sports to increase opportunities, women's gymnastics was cut from 190 teams to only 90. This reflects the small squad size of a gymnastics team, making it unattractive in the numbers game. The small squads of fencing and archery, other women favorites, also fell sharply. *Id.* As a result, nearly all of the women on the Olympic gymnastics team developed their skills in private clubs rather than Title IX programs. In the 2000 Olympics we failed to win a single women's gymnastics medal, and in 2004 the only gymnastics medals were won by private club, non-Title IX athletes.

In sports for which women share the practice facility with men, the elimination of the men's team means that the practice facility is eliminated for women too. Fencing is an example. The elimination of 42 men's fencing teams between 1981-82 and 1998-99 caused a similar elimination of nearly as many teams (31) for women. *GAO Report* at 12-13. Arch-

ery, too: the number of men's teams declined during the period to a total of only six in 1998-99, and the number of women's archery teams declined to the same small number. *Id.*

On the men's side, the combination of the proportionality test and private cause of action has caused declines in most of the large squad sports. Wrestling teams, as discussed above, have declined by 40%, reflecting a drop of the sport by an astounding 171 schools; 37 schools dropped football; 27 dropped outdoor track; 25 dropped swimming; and 10 ended ice hockey. *Id.* at 13.

An often-cited example by proponents of the proportionality test is women's soccer, which grew by 1,058% in college. *Id.* at 12. However, that growth is not attributable to the proportionality test. Rather, that is an example of how supply directly met demand *without* government quotas, as girls' soccer grew by 912% in high school over the comparable period.[4] Soccer serves as proof that intercollegiate teams increase in proportion to demand, without the need for gender quotas.

The encouragement of quotas by the proportionality test is senseless, and does not help women. They are not helped one iota when male athletes are cut from their teams by virtue of capping or eliminating teams. No one inside or outside of government has offered a rational defense of it, and the decision below simply ignores it. Capping teams is particularly harmful to "walk-ons", who are athletes neither recruited nor

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[4] According to the National Federation of State High School Associations, the number of girls' interscholastic soccer teams increased from 599 to 5,463 from 1977 to 1994, the high school years corresponding to the GAO's 1981-1998 survey of intercollegiate sports. *See* National Federation of State High School Associations Participation Study 1971-01, at 187. (http://www.ncaa.org/library/research/participation_rates/1982-2001/175-192.pdf (viewed Oct. 4, 2004)).

funded by scholarships. These are students who, simply out of their own enthusiasm, want to try out for a competitive team. They "walk on" the practice field and attempt to make the team, happy to sit on the bench while others play, as acclaimed in the popular movie "Rudy" (Columbia Tri-Star, 1993). Because they play for love of the sport and nothing else, consuming no scholarship or recruitment dollars, there is no justification for including them in a numerical balancing. Yet the proportionality test does arbitrarily include them, thereby giving colleges reason to impede the walk-ons. "[T]hree to four times more men than women arrive unsolicited for the first week of practices," and the proportionality test requires cutting many walk-ons previously allowed. Bill Pennington, "Want to Try Out for College Sports? Forget It," *N.Y. Times* (Sept. 22, 2002). Debbie Yow, the athletic director for the University of Maryland, admitted, "[t]he men's [lacrosse] coach has been turning players away while the women's coach has been literally begging women to fill out the roster." John Tierney, "Why Don't Women Watch Women's Sports?", Week in Review, *N.Y. Times* (June 15, 2003). "[I]n order to keep the number of male and female players balanced to comply with Title IX, the men's lacrosse team has had to reduce its roster." *Id.*

The gender quotas challenged here also fail to allow for differences in interest, age and susceptibility to injury between boys and girls, and men and women. "Female athletes, particularly basketball players, are far more likely than their male counterparts to suffer ACL [Anterior Cruciate Ligament] injuries." Stephen Hargis, "Girls have more torn ACLs," *Chattanooga Times Free Press* (Tennessee), D1 (Feb. 4, 2005). According to the American Academy of Orthopaedic Surgeons, the risk of women tearing their ACL is 1 in 100. This number drops significantly to only 1 in 500 for men. *See* Nikki Usher, "Knee injury takes toll on girls playing soccer five times more likely than males to suffer a torn ACL," *Philadelphia Inquirer*, A01 (Nov. 29, 2004). "Com-

pared with guys, female athletes run an eight-times-greater risk of tearing the ACL, a fibrous band that connects the shinbone (tibia) to the thighbone (femur). Basketball, soccer and other sports that require cutting moves or jump shots can put athletes at risk." Kathleen Fackelmann, "Girls face higher knee injury risk," *USA Today*, 15B (Aug. 24, 2004). Timothy Hewett, PhD, the lead researcher on a definitive study at the Sports Medicine Biodynamics Center at the University of Cincinnati, says this is "close to a billion-dollar problem in girls and women in the USA. ... Even after girls have recovered from the acute injury, the changes in the joint may set the stage for osteoarthritis of the knee ....." *Id.* That obvious suspicion was quickly confirmed: a study subsequently published in *Arthritis & Rheumatism* demonstrated that "more than half of ... 103 soccer players, who were ages 14 to 28 at the time of the ACL injury, suffered osteoarthritis of the knee at the time of the study -- about 12 years later." Kathleen Fackelmann, "Girls' knee injuries have later consequences," *USA Today*, 9D (Oct. 7, 2004). "Many of the women, who were about 31 by that time, also said they had pain or some other disability that made it hard to conduct daily activities." *Id.*

The discriminatory effects of the gender quotas are increasing as the percentage enrollment of women in colleges increases. As observed by the trial court below, men still hold onto a majority in varsity sports but face senseless cutting under the proportionality test to reduce their percentage on sports to the overall enrollment. 263 F.Supp.2d at 94. Also, the planned application of gender quotas to the high school level, and an onslaught of lawsuits by private parties if schools fail to meet the quotas, could force the elimination of over one million boys from high school sports.

In sum, Petitioners have standing to contest the policy that encourages exclusion of their members "from participation in ... any education program or activity receiving Federal financial assistance" on account of sex. 20 U.S.C. § 1681(a).

CONCLUSION

This Court should grant the Petition for *Writ of Certiorari*.

Respectfully submitted,

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608

Counsel for Amicus Curiae

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